

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 IN AND FOR THE COUNTY OF MOHAVE  
3

4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs. ) Cause No. CR-2007-1492  
7 WAYNE O. HALL, )  
8 Defendant. )  
9 ----- )

10 STATE OF ARIZONA, )  
11 Plaintiff, )  
12 vs. ) Cause No. CR-2007-1544  
13 JOSE A. ARREZ-LOPEZ, )  
14 Defendant. )  
15 ----- )

16 Kingman, Arizona  
17 Thursday, December 13, 2007  
18 9:03 a.m.

19 BEFORE: The Honorable Steven F. Conn, Judge

20 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
21 Evidentiary Hearing  
22  
23

24 Reported by: Norma Jean DeLong, RPR, Official Reporter,  
25 Certified Reporter #50717

1 (CAPTION CONTINUED)

2 STATE OF ARIZONA, )

3 Plaintiff, )

4 vs. )

Cause No. CR-2007-1550

5 DANN R. PAYNE, II, )

6 Defendant. )

7 ----- )

8 STATE OF ARIZONA, )

9 Plaintiff, )

10 vs. )

Cause No. CR-2007-1522

11 CINDY L. McBRIDE, )

12 Defendant. )

13 ----- )

14 STATE OF ARIZONA, )

15 Plaintiff, )

16 vs. )

Cause No. CR-2007-1555

17 JOHN P. HAMPTON, )

18 Defendant. )

19 ----- )

20 STATE OF ARIZONA, )

21 Plaintiff, )

22 vs. )

Cause No. CR-2007-1558

23 RONALD F. JONES, )

24 Defendant. )

25 ----- )

1	STATE OF ARIZONA,	)	
		)	
2	Plaintiff,	)	
		)	
3	vs.	)	Cause No. CR-2007-1580
		)	
4	ANGELICA JOHNSON,	)	
		)	
5	Defendant.	)	
		)	
6	-----		
	STATE OF ARIZONA,	)	
7		)	
	Plaintiff,	)	
8		)	
	vs.	)	Cause No. CR-2007-1610
9		)	
	MICHELE M. CATHERS,	)	
10		)	
	Defendant.	)	
11		)	
	-----		
12	STATE OF ARIZONA,	)	
		)	
13	Plaintiff,	)	
		)	
14	vs.	)	Cause No. CR-2007-1620
		)	
15	RANDELL L. BEHR,	)	
		)	
16	Defendant.	)	
		)	
17	-----		
	STATE OF ARIZONA,	)	
18		)	
	Plaintiff,	)	
19		)	
	vs.	)	Cause No. CR-2007-1685
20		)	
	JAMES P. MAROLPOULOS,	)	
21		)	
	Defendant.	)	
22		)	
	-----		
23			
24			
25			

## 1   Appearances:

2       For the State:

James J. Zack  
Chief Deputy County Attorney  
MOHAVE COUNTY ATTORNEY'S OFFICE  
315 North Fourth Street  
Kingman, Arizona 86401

5       For the Public  
6       Defender's Office:

Mark I. Harrison  
Diane M. Meyers  
Larry A. Hammond  
Attorneys at Law  
OSBORN-MALEDON  
The Phoenix Plaza  
2929 North Central Avenue  
21st Floor  
Phoenix, Arizona 85012-2794

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## I N D E X

1		
2		
3	<u>OPENING STATEMENT</u>	<u>PAGE</u>
4	Mr. Harrison	13
5		
6	<u>WITNESSES</u>	
7	<u>DANA P. HLAVAC</u>	
8	Direct - Ms. Meyers	18
9	Questions by the Court	60
10	Redirect - Ms. Meyers	82
11		
12	<u>NORMAN LEFSTEIN</u>	
13	Direct - Ms. Meyers	85
14		
15	<u>CLOSING ARGUMENT</u>	
16	Mr. Harrison	119
17		
18	<u>EXHIBITS</u>	<u>RECEIVED</u>
19	D-1	83
20	D-2	34
21	D-4	91
22	D-5	118
23	D-6	118
24		
25		

1 P R O C E E D I N G S

2 THE COURT: Thank you. Be seated.

3 This is Cause Number CR-2007-1492, State versus  
4 Wayne O. Hall and all the others that are listed on the  
5 calendar, which I won't go through at this time.

6 And can counsel that I don't know just introduce  
7 yourselves to me, please?

8 MR. HARRISON: Good morning, Your Honor. My  
9 name is Mark Harrison. I'm with the firm of Osborn-  
10 Maledon in Phoenix. And I'm one of the counsel  
11 representing the office of the Public Defender.

12 THE COURT: Good morning, Mr. Harrison.

13 MS. MEYERS: Good morning, Your Honor. Diane  
14 Meyers, also with the firm of Osborn-Maledon, also  
15 representing the office of the Public Defender.

16 THE COURT: All right. Good morning,  
17 Ms. Meyers.

18 Show the presence of --

19 MR. HAMMOND: Good morning, Your Honor.  
20 Larry Hammond --

21 THE COURT: Oh, I'm sorry.

22 MR. HAMMOND: That's all right. You actually  
23 may know me, so I may not even need to stand up, but I'm  
24 Larry Hammond, and I'm also here on behalf of the Public  
25 Defender's Office.

1                   THE COURT: Good morning, Mr. Hammond. I  
2     can't always see whoever's behind the lectern there.

3                   Show the presence of Mr. Harrison, Ms. Meyers,  
4     and Mr. Hammond representing the Public Defender's Office  
5     for the limited purpose of this hearing. Show the  
6     presence of Mr. Hlavac, who is their client for purposes  
7     of this hearing, and show the presence of Mr. Zack  
8     representing the State.

9                   A couple of preliminary matters that I need to  
10    address. I did not have the jail bring each of the  
11    defendants over here. I did not think that there was  
12    really very much to be gained by having them present today  
13    just for logistical reasons, so I made the conscious  
14    decision to not bring them over here.

15                  And I understand that probably neither  
16    Mr. Harrison, Ms. Meyers, or Mr. Hammond is going to  
17    object to that because they don't represent the  
18    defendants, so you wouldn't have standing to object to  
19    that. And Mr. Hlavac won't object to it because his  
20    position is that he's not representing these people.

21                  So that is my decision to have not brought them  
22    over here. And I did not intend to allow any of you to be  
23    heard on that unless you want to.

24                  MR. HAMMOND: Your Honor, I don't know that  
25    we need to be -- to be heard on it. And you're right, we

1 intend to interpose no objection.

2 But I think for the information of the Court, we  
3 have asked one of the lawyers who has made a limited  
4 appearance on behalf of one of those defendants --  
5 Mr. Mike Terribile -- to be with us here today as an  
6 observer. And we think in his capacity as an observer he  
7 may be able to provide a link to at least one of those  
8 clients and possibly to others.

9 THE COURT: All right. And it's been a  
10 while. I know I've seen you before.

11 Is Mr. Terribile here?

12 MR. TERRIBILE: Yes, I am, Your Honor. I'm  
13 right here.

14 THE COURT: We'll show the presence of  
15 Mr. Terribile.

16 I won't identify your status in this case  
17 because that may be a little up in the air.

18 I know that I have taken the position -- and  
19 this is probably not the time to debate that -- that you  
20 do not have any standing in this case, but I recognize  
21 that you and many other attorneys in the criminal defense  
22 bar in the state of Arizona have expressed a great  
23 interest in these proceedings.

24 And the other preliminary matter -- and I had  
25 hoped to get this resolved in advance of this hearing -- I



1 just need to know, Mr. Zack, you filed a pleading which  
2 did not clearly state as much as I would have liked it to  
3 whether you are going to take the position that you have  
4 the right to either question witnesses or present  
5 arguments or present evidence at this hearing.

6 Are you here as an observer or are you taking  
7 the position that you have the right to have a more active  
8 involvement in this hearing?

9 MR. ZACK: Your Honor, I view the State's  
10 role in this hearing as assisting the Court in whatever  
11 fact-finding determinations it believes it has to make to  
12 make a ruling in this case. I'm not here to dictate who  
13 represents each defendant. I recognize that is an issue  
14 that we're not involved in.

15 But when basically we're seeing kind of a full  
16 assault on the system in Mohave County, with a couple of  
17 waves of attacks already, I think that we do have some  
18 role to play in this case, in this situation to make sure  
19 that the Court gets the facts it needs to make the rulings  
20 it needs to make.

21 THE COURT: All right. That was probably a  
22 deliberately vague way of answering my question. Are  
23 you -- for example, are you reserving the right to cross-  
24 examine witnesses that are presented?

25 MR. ZACK: Yes.

1                   THE COURT: Are you reserving the right to  
2 call witnesses and have evidence presented yourself?

3                   MR. ZACK: I reserve that right, although I  
4 don't intend to do so.

5                   THE COURT: All right. Are you reserving the  
6 right to present argument to me as to whether I should  
7 grant the Public Defender's Office motions to dismiss?

8                   MR. ZACK: I'm --

9                   THE COURT: Or motions to withdraw?

10                  MR. ZACK: I'm not going to take a position  
11 on those. Again, I'm just here to assist in whatever fact  
12 finding the Court wants to make.

13                  THE COURT: All right. Well, I think we need  
14 to clarify this ahead of time. And I think the defense  
15 position is pretty well known. And I -- I understand that  
16 there's been assertions made that if the -- if Mr. Zack  
17 does something, a bar complaint is going to be filed  
18 against him. And I'm not particularly impressed by that  
19 as a means of advocacy, and that's not going to determine  
20 my decision in this case.

21                  But I believe the authority that I'm familiar  
22 with would suggest to me that this is not an issue that  
23 the County Attorney's Office has standing to involve  
24 itself in.

25                  And I'm not engaging in this analysis, Mr. Zack,

1 to protect you from a bar complaint, but the Court is  
2 ordering that the County Attorney's Office will not be  
3 allowed to cross-examine witnesses, present evidence, or  
4 to argue this case.

5 If something develops during this hearing that  
6 concerns me that I haven't had information presented and  
7 that I need some other avenue to have things presented to  
8 me, I'll reserve the right to re-evaluate this issue. But  
9 I am not going to allow the County Attorney's Office to  
10 actively participate in this hearing.

11 I'm not going to make you leave, Mr. Zack. And  
12 I certainly understand that the State has an interest in  
13 decisions that could affect funding for the County. The  
14 State has an interest in seeing that cases are prosecuted  
15 in a timely manner. There are victims' rights that have  
16 to be honored. The County Attorney's Office, as the  
17 counsel for the sheriff's office, has an interest in  
18 seeing that there are people that are not languishing in  
19 jail while all of us attorneys grapple with this really  
20 interesting issue of who ought to be representing them.

21 But for now I'm not going to allow the County  
22 Attorney's Office to participate in this hearing other  
23 than simply being present.

24 And, Mr. Hammond, for all I know maybe you want  
25 them to participate. Is there something you wanted to

1 mention?

2 MR. HAMMOND: Very, very briefly, Your Honor.

3 We, of course, are in total agreement with your ruling,  
4 but I felt it important to respond to the suggestion that  
5 there might have been an accusation that would involve a  
6 bar complaint. I want to represent to the Court that no  
7 such accusations have been made. If anyone took anything  
8 that was said by counsel on behalf of the Public  
9 Defender's Office as a threat that a bar complaint would  
10 be filed, nothing could be further from the truth.

11 And I would like that to be clear. And I'd like  
12 the County Attorney not to be laboring under any mis-  
13 impression about that.

14 THE COURT: Well, that's up to them. I  
15 understand that the State has filed a pleading indicating  
16 that they thought that that had happened. I personally  
17 thought that that assertion was made at a hearing on the  
18 record in my courtroom. But that's not what this hearing  
19 is about, and I'd like to try to focus on what the hearing  
20 is about.

21 So I just need to inquire, is there one of you  
22 between Mr. Harrison, Ms. Meyers, or Mr. Hammond that is  
23 actually going to be lead counsel that I should be  
24 addressing from this point on?

25 MR. HARRISON: Here's the way I propose to

1 direct this presentation, Your Honor --

2 THE COURT: And that will be helpful if I  
3 know where we're going.

4 MR. HARRISON: Right. I'm going to make a  
5 very, very brief opening statement and then turn the  
6 proceeding over to my colleague, Diane Meyers, who will  
7 examine our two witnesses, and then I will make some brief  
8 closing remarks.

9 And unless some issue comes up, which is  
10 entirely possible, about which I'm not qualified to speak,  
11 Mr. Hammond will speak, but that isn't in the plan right  
12 now.

13 THE COURT: All right. And you may proceed  
14 with your opening comments.

15 MR. HARRISON: Okay. Your Honor, I've  
16 reviewed all of the Court's various minute entry orders  
17 since the inception of this matter. And with reference to  
18 the Court's minute entry order dated October 30 in which  
19 the Court outlined the Court's concerns about the effect  
20 of the pending motions to withdraw and the need to provide  
21 a factual basis for any ruling the Court might make, the  
22 Court also said that -- and not surprisingly -- you're  
23 familiar with caseload standards, since that whole issue  
24 has some genesis in this county, and you understandably  
25 don't want to make rulings on the motions to withdraw in a

1 factual vacuum.

2 Our purpose today, very simply, is to provide  
3 the factual basis on which you can make such a ruling.  
4 And in order to do that we want to both have the Public  
5 Defender testify at some length, and provide you with the  
6 testimony of -- written and oral -- of two highly  
7 qualified experts intimately familiar with the whole  
8 subject of excessive caseloads as they relate to a  
9 lawyer's independent responsibility to determine whether  
10 he or she is complying with the rules of professional  
11 conduct and the related problems of potential violations  
12 of the Sixth Amendment of the federal constitution and the  
13 violation of Article II, Section 24 of the state  
14 constitution.

15 So to do that we're going to have the testimony  
16 of Dana Hlavac and Professor -- former dean -- Norm  
17 Lefstein, and provide the Court with the affidavit of John  
18 Wesley Hall.

19 There's one final point I want to make before I  
20 turn it over to Ms. Meyers. What struck me -- first of  
21 all, I should confess to the Court that Mr. Hammond and I  
22 both have some history with these issues, because, as the  
23 Court may be aware, we were both involved in the Zarabia  
24 versus Bradshaw case which was decided by the supreme  
25 court about ten years ago, which didn't involve precisely

1 these issues but which raised many issues which are  
2 pertinent and addressed in dicta the whole question of the  
3 county's responsibility to fund a system which assures  
4 competent, ethical representation.

5 Mr. Terribile and I and Mr. Hammond were  
6 involved in a case in Maricopa County that is actually  
7 closer to this case.

8 And so I wanted the Court to be aware that this  
9 is not our baptism when it comes to issues of this kind.

10 All of the authorities that have addressed this  
11 subject -- and ironically *Smith* is one of those  
12 authorities, but there are ABA opinions, as the Court is  
13 aware, there's Arizona opinions.

14 86-4 and 90-10 are the Arizona opinions which  
15 squarely address this issue and make it clear that the  
16 decision about whether a lawyer should or should not move  
17 to withdraw is uniquely and exclusively vested in the  
18 lawyer in consultation with his or her supervisor.

19 And I say that because while I think the Court  
20 is absolutely on target in wanting to have a factual  
21 record to support decisions of that kind, in the final  
22 analysis it's got to be up to the lawyer to determine  
23 whether he or she can provide assigned clients with  
24 effective, ethical representation.

25 So with that, with that opening -- and I believe

1     once you've heard the evidence it will confirm for you the  
2     need to grant these motions.

3             And so at this point I'd like to turn the case  
4     over to my colleague, Diane Meyers, who will examine the  
5     two witnesses we wish to present.

6             THE COURT: All right. Ms. Meyers, you may  
7     proceed.

8             MS. MEYERS: Thank you, Your Honor. We would  
9     like to call Mr. Dana Hlavac to the stand.

10            THE COURT: All right. Mr. Hlavac, you can  
11     come on up, and the clerk will swear you in.

12                     DANA P. HLAVAC,  
13     called as a witness, being first duly sworn, testified as  
14     follows:

15            THE COURT: All right, sir, you can have a  
16     seat right over here, if you would, please.

17            MS. MEYERS: Your Honor, we have three  
18     documents which we will use in examination of Mr. Hlavac.  
19     We can provide copies to the Court and to the County  
20     Attorney, but could we give those to the witness now to  
21     effectuate the examination more efficiently?

22            THE COURT: Certainly.

23            MS. MEYERS: Thank you.

24            THE COURT: And before we get started I guess  
25     I need to explain one thing on the record. I -- since the



1 first hearing that started this issue I have participated  
2 in a two-hour meeting at which we discussed many of the  
3 things which I'm sure are going to be presented today.

4 And Mr. Hlavac gave a presentation at that  
5 meeting. And so I know that I know a lot of the things  
6 that are going to be discussed at this hearing. But I  
7 still feel that there's a need to have a record made of  
8 these issues, so that, for example, the County doesn't  
9 think that we're all meeting behind closed doors, talking  
10 about things that are secret to them.

11 I just want there to be a record made that  
12 develops the facts that will support whatever decision is  
13 going to be made in this case.

14 And I know Mr. Hlavac knows that, but I just  
15 wanted to make sure that everyone else knew it.

16 MR. HARRISON: You don't need our  
17 concurrence, but we fully respect the Court's approach to  
18 this.

19 THE COURT: And you may proceed, Ms. Meyers.

20 MS. MEYERS: Thank you, Your Honor.

21 Your Honor, would you like copies of these?

22 THE COURT: Sure.

23 MS. MEYERS: May I approach?

24 THE COURT: Yes.

25

DIRECT EXAMINATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MS. MEYERS:

Q. While we're waiting for the exhibits to be marked, Mr. Hlavac, could you introduce yourself, tell us how long you've been licensed as an attorney, how long you've been the County Public Defender, and what you did before you came here?

A. I'm Dana -- Dana Hlavac. I became originally licensed in Colorado in roughly October of 1988. During the course of my career I -- when I was a senior in college I ran and -- I was the manager of student catering operations and ran catering operations in the Carrier Dome, Syracuse University.

After graduation I went into the US military. I was a platoon leader, a company executive officer, and, finally, a battalion maintenance officer.

As a battalion maintenance officer I handled an organization with over 100 employees and a 20-million-dollar budget.

I became -- after I became licensed I was a deputy prosecutor, deputy district attorney for a two-year period; I was a chief prosecutor for a two-year period in Colorado; and then I came here in 2001, March of 2001.

Q. So you've been in the office for roughly almost seven years?

1 A. Yes.

2 Q. Six and three-quarter years?

3 A. Correct.

4 Q. Describe the office, office of -- and when I  
5 refer to the office, I'm going to be referring to the  
6 office of the Mohave County Public Defender. Describe the  
7 office that you joined back in 2001.

8 A. It was mostly vacant. The joke was you could  
9 throw a ball down the hall and you'd never hit anybody.  
10 There were two attorneys ostensibly on staff. There was a  
11 third one who already has his resume out and was looking,  
12 and he left a few weeks after I got here to go to Yuma.

13 So there were two attorneys: Mr. Frank Dickey  
14 and Mr. Alex Bolobonoff. During the course of that year  
15 there were roughly 3300 cases processed by the office.

16 Q. By my math, that's over 1500 per attorney.

17 A. Roughly.

18 Q. Okay. I take it that that's no longer the case?

19 A. It's not. There -- at the time we came in there  
20 was very limited data. Records management was very poor.  
21 It was difficult to really track numbers, track cases,  
22 other than the fact that there were a lot of files.

23 With the County Attorney's Office and Legal  
24 Defender's Office we convinced the County to buy a fairly  
25 sophisticated data -- case management database system,

1 which was put into place in roughly November of 2001.

2 Since then we've been working on hiring people,  
3 training people, improving the numbers, providing more  
4 accurate data on which to create a solid, effective  
5 system.

6 Q. Could you describe all of your duties and  
7 obligations as the Public Defender of Mohave County?

8 A. I don't know if I have time for all of them, but  
9 essentially there's internal responsibilities and external  
10 responsibilities.

11 Among the external responsibilities are my  
12 duties to the County, the county manager, who is my boss,  
13 the board of supervisors. That includes attending county  
14 staff meetings, board of supervisor agenda review,  
15 providing input on a department head level to what's going  
16 on in the county overall, listening to what's going on in  
17 other departments, ensuring that any impacts on our  
18 department is coordinated or understood, any budget  
19 impacts are considered in preparation for the next year's  
20 budget.

21 Additionally, there are responsibilities in  
22 terms of keeping track of what's going on in the state.  
23 I'm a lobbyist for both the County and the State Public  
24 Defender Association. We track legislation that can have  
25 an impact not just on the job of the defense attorneys but

1 also a financial impact on the County itself.

2 So if there's legislation that's going to create  
3 additional caseload or requirements on either the  
4 defenders or the prosecutors, we track that and report  
5 that back to the county manager so he can advise the board  
6 of supervisors and they can work with the County  
7 Supervisors' Association to potentially impact negative  
8 pending legislation.

9 Q. You sort of manage the impact on a budget -- to  
10 the County's budget?

11 A. Correct. Looking at that, the bigger picture of  
12 what's going on in the state.

13 I also work with -- on the national level have  
14 been involved in the recent passage of -- and I don't even  
15 remember the name -- there's loan forgiveness essentially  
16 that just passed and signed by the President which  
17 provides that public service attorneys, after ten years of  
18 payment on their school loans, can essentially have the  
19 remaining balance wiped out.

20 And that was huge. We'd been working on it for  
21 roughly five years. Also working on it at state level.  
22 And obviously we had worked to successfully get a local  
23 loan repayment plan as well. And that took a lot of  
24 documenting, figuring what data we need and going back and  
25 going through HR records, personnel records, finance

1 records, and caseload records to do that.

2 Internally there's budget preparation, there's  
3 review of policies, evaluations.

4 Our evaluation process was virtually nonexistent  
5 when we came in. Our evaluation process now, if you ask  
6 some, is extremely cumbersome but it's extremely thorough.  
7 And standards -- we went through every standard that we  
8 could find, both nationally, on a state basis --  
9 Washington standards, Indiana standards -- NLADA  
10 standards, and kind of consolidated those into what we  
11 expect of our attorneys. So it's very clear what our  
12 expectations are, what the performance expectations are.

13 Q. Do you have a role in recruiting and retention  
14 and training of attorneys in your office?

15 A. All the recruiting. We'll occasionally send an  
16 attorney on a recruiting trip, an on-campus interview or a  
17 career fair at either ASU or U of A. But for the most  
18 part we essentially send out advertisements.

19 Since the passage of the loan repayment plan and  
20 the relocation plan we do kind of a blanket e-mail to  
21 every law school in the country roughly this time of the  
22 year seeking applicants from third-year graduating  
23 students.

24 When we do that we then have to sort through  
25 between 100 and 200 applications, decide who we want to

1     invite to proceed further.

2             Last year I believe we invited 26 or 30 people  
3     out to interview. Arrange all of that.

4             In addition to that we do recruiting on a state  
5     basis for more senior attorneys in terms of lateral people  
6     who might come from other offices or are experienced  
7     attorneys.

8             Unfortunately, there's not a whole lot of  
9     qualified, experienced attorneys that really want to come  
10    to Mohave County.

11    Q.     And with respect to the practice of law both by  
12    yourself and attorneys in your office, I assume as the  
13    head of the office you exercise a supervisory role?

14    A.     Up until very recently I've had a direct  
15    supervisory role essentially over all the attorneys. I'd  
16    sit with attorneys, as possible, to discuss what cases  
17    they had, what issues they had.

18             We've recently reorganized to include a chief  
19    felony trial deputy who will oversee the felony attorneys  
20    and created the training director position who will  
21    oversee the junior attorneys and the juvenile attorneys.  
22    But that position will not be filled until January.

23             Even with those positions, ostensibly even if  
24    I'm only the reviewer on evaluation, I have to go down and  
25    see what attorneys are doing in court, look at what their

1 performance is.

2 I review virtually every kite that comes through  
3 the office to know what are clients complaining about,  
4 what are parents complaining about, voice messages,  
5 respond to all the complaints about attorneys, staff,  
6 everything else.

7 Q. For the record, what do you mean by "kite"?

8 A. Kites are jail correspondence from inmates or  
9 from clients who are in jail.

10 Q. Now, do you have your own practice?

11 A. I carry a limited caseload. What I try to do is  
12 take on more serious cases and then mentor younger  
13 attorneys by having them co-counsel the cases with me.

14 Q. With all of your supervisory, administrative,  
15 and your actual practice of the law, would you say you  
16 have a full workload?

17 A. And then some. I tend to average 90 to 100  
18 hours per pay period. Early on when we were really,  
19 really struggling it wasn't uncommon to have weeks with  
20 110, 120 hours in a pay period.

21 Q. Pay period is biweekly?

22 A. Biweekly, yes.

23 Q. Let's talk a little bit about the structure of  
24 your office. What kind of support -- and by "support" I  
25 mean nonlicensed attorneys -- do you have in the office



1 right now?

2 A. We have six legal secretaries; all those  
3 positions are full. We have four investigators; all those  
4 positions are full. We have three office clerks; all of  
5 those positions are full; we have an office specialist,  
6 and we have an office supervisor, we have a mitigation  
7 specialist, and a paralegal, and all of those positions  
8 are full.

9 Q. And how many licensed attorneys does the office  
10 currently employ?

11 A. We had one who received a bar number yesterday,  
12 so we have one more. I believe we currently have nine or  
13 ten. I'd have to detail, go back through. We had one who  
14 just retired and one who's out on FMLA.

15 Q. And we'll get into more detail on the actual  
16 attorneys, but roughly nine or ten?

17 A. Yes.

18 Q. Including the one who just received a bar card  
19 yesterday?

20 A. Yes.

21 Q. What -- let's talk about how you assign your  
22 professional staff, your licensed attorneys to the Mohave  
23 County courts. Would you describe that, please?

24 A. What we try to do is a court-based system so an  
25 attorney can maximize their efficiency. They're assigned

1 to Judge Conn's division, Judge Moon's division, and then  
2 it's either been Judge Weiss or Judge Chavez and most  
3 recently it's Judge Jantzen.

4 We try to make sure they only have to go to one  
5 place so they can handle one docket. Create the  
6 efficiencies of not bouncing around.

7 When I first got here -- and I know Legal  
8 Defender is still forced to do this -- it was very  
9 inefficient because an attorney would have to be in  
10 Bullhead justice court in the morning, Havasu justice  
11 court in the early afternoon, and back here for a felony  
12 case. So they'd spend five hours a day traveling. And  
13 that's unproductive time.

14 So we've tried to minimize that by just  
15 assigning attorneys to a specific, individual court.

16 Q. And could you run through the courts that you  
17 staff with the County?

18 A. We staff the essentially four local justice  
19 courts: the Lake Havasu City Justice Court, the Bullhead  
20 City Justice Court, the Kingman Justice Court, and Cerbat  
21 Justice Court. Kingman-Cerbat are essentially one court,  
22 and we staff them with the same people for both.

23 We do not staff the Moccasin court. Again, for  
24 efficiency purposes. It's, you know, an eight-hour trip  
25 there, eight-hour trip back. And it's just not an

1 effective use of time. We've had two cases that we've had  
2 to handle up there because of conflicts with a contract  
3 attorney. And sending an attorney up there is not a good  
4 use of time.

5 Q. Fair to say based on your testimony that you've  
6 done what you can in your six, almost seven years in the  
7 office to introduce some efficiencies to the way you  
8 assign your attorneys in the Mohave County court system?

9 A. Absolutely.

10 Q. Does your office handle appeals or any post-  
11 conviction cases?

12 A. We handle all the appeals and post-conviction  
13 relief. Legal Defender now picks up some. But we have --  
14 on our organization chart there's two people that are  
15 designated for appeals. We currently have one on staff.  
16 And I believe she's got 22 open appeals and roughly 20  
17 PCRs that are pending.

18 Q. And we'll get into certainly the caseloads and  
19 the workloads of your attorneys.

20 How many licensed attorneys do you -- does your  
21 budget provide for?

22 A. We're authorized 21 full-time employees,  
23 licensed attorneys, including the Public Defender, the  
24 training director, and the chief trial deputy.

25 Q. And why -- why don't you have a full

1 professional staff? You have nine or ten and you've got  
2 21 --

3 A. Well, we have I believe it's 18 employees  
4 currently. The problem is a lot of them are pending -- we  
5 have two additional employees who are pending clearance by  
6 character and fitness. And we simply have no control over  
7 that. And then we have three people who are taking the  
8 February bar. And we have to wait for them to take and  
9 pass the bar.

10 As I've said before, historically we've had  
11 difficulty recruiting people from within Arizona who would  
12 come to Kingman and stay in Kingman. Even when we  
13 recruited law students, they would come, they'd get  
14 trained, and then they'd kind of get sucked down to  
15 Maricopa County where, one, the lifestyle is better and,  
16 two, the money was generally better.

17 To a large extent our lack of ability to train  
18 people to have appropriate caseloads -- people get  
19 overworked, they get stressed out, and they've left.

20 We've changed our recruiting practices to  
21 emphasize out of state and have found that people who are  
22 coming from out of state generally have a different view  
23 of Arizona. They're not looking for Phoenix, they're  
24 looking for more rural Arizona, kind of the Tombstone  
25 look, and that's something that Kingman does have to

1 offer. And those people are tending to stay in Kingman  
2 once we bring them in.

3 Q. Now, you referred to a few positions that you  
4 filled. And just so that the record is clear and to  
5 clarify that, pending character and fitness and pending  
6 bar, I take it they're attorneys but not licensed in  
7 Arizona? Is that what you mean by --

8 A. They're not attorneys until they're licensed.

9 Q. You have --

10 A. One of the problems we have is when you recruit  
11 a third-year law student -- the recruiting season occurs  
12 essentially November and December. The bar applications  
13 begin in January and then they terminate. If you don't  
14 have it in by the end of March you can't sit for that bar  
15 examination.

16 So to fill a position that -- a vacancy that I  
17 have now with a third-year law student -- I recruit now, I  
18 give an offer in January or February, that person takes  
19 the bar next July and might be licensed and on staff next  
20 year.

21 So it takes roughly a year at this time of year  
22 to even get somebody who's a third-year graduate student  
23 to come on staff and be licensed.

24 Q. And that delay is not something in your control?

25 A. The only thing we can control is try to get

1 somebody who's licensed in the state and to come in  
2 laterally. And just -- we just have not had great success  
3 with that.

4 Q. Now, obviously the focus of the hearing is  
5 caseloads and workloads so I want to talk about that now.  
6 What do you mean by a caseload?

7 A. A caseload is a pure numerical count. If you go  
8 back to *Joe U. Smith* and the National Advisory Council,  
9 the NLADA standards, the Department of Justice, Compendium  
10 of Indigent Defense standards, they all basically say:  
11 "Here's how many cases an attorney should not exceed."  
12 *Joe U. Smith* uses the language that "an attorney shall not  
13 exceed 150 felony cases," I believe it's 200 juvenile  
14 cases, 400 misdemeanor cases.

15 What we do to kind of normalize or weight those  
16 cases is we turn everything into a felony equivalent. And  
17 that's called case weighting.

18 So essentially if you can handle 400  
19 misdemeanors, then a misdemeanor has a weight of .375,  
20 which is basically 150 divided by 400. We do the same  
21 thing for everything else. Count up the number of cases  
22 that we receive over a period of time and use that as a  
23 proactive planning tool.

24 That lets us go back to Budget and to the County  
25 and say: "Historically this is what we expect our cases

1 to be next year. This is what our staffing needs to be to  
2 handle those cases internally."

3 Q. Now, let me break that down. Now, caseload  
4 doesn't include all these other responsibilities that a  
5 lawyer might have? What does -- what does it not include?

6 A. Caseload purely is a number of cases an attorney  
7 has. It's not the same as workload. Workload is  
8 significantly different.

9 When you look at the -- the case weighting  
10 studies that have been done around the country, what they  
11 do is they say: "This is how many hours an attorney has  
12 to dedicate to case work each year." And every study  
13 that's been done, it comes out roughly 1600 hours. The  
14 rest of their time is spent with administrative duties,  
15 paperwork, timesheets, training, things that they can't  
16 dedicate to cases.

17 So the question, when you talk about workload,  
18 is, how many cases can you do within that 1600 hours.  
19 That will vary significantly. And to be effective should  
20 probably be lower than the 150 number, depending on the  
21 type of cases you have.

22 Q. And does your office -- you talked about the  
23 macro planning use of raw caseload numbers. Does your  
24 office or do you as a supervisor of the office monitor on  
25 an ongoing basis the caseloads and workloads of the

1 attorneys whom you supervise?

2 A. We do. In addition to just anecdotally talking  
3 to attorneys about how their caseloads are we have a  
4 report -- I think you have a copy of it somewhere -- that  
5 we run whenever we -- at least once a week, if not more  
6 often, that -- what it does is it looks at each attorney  
7 and it tells us and lists the number of cases and the type  
8 of cases and the dates of cases that they have that have  
9 future open court dates.

10 So there are some cases that that attorney is  
11 actually assigned that don't appear on that list. For  
12 instance, if an attorney had a court appearance today and  
13 I ran that report today, none of the cases that that  
14 attorney has scheduled today will show up on that report.  
15 So those reports fluctuate daily.

16 What we keep in addition to that is a -- kind of  
17 a summary report that takes that number of open cases and  
18 it follows it every day for an attorney. And then we can  
19 look on a graph basis of where their caseload has been.

20 The ideal caseload that's generally accepted and  
21 best practice is, is somewhere between 25 and 35 open  
22 cases in that standard.

23 Q. And by that you mean that would project to sort  
24 of your annual limit? Is that --

25 A. Yes.



1 MS. MEYERS: Your Honor, may I approach?

2 THE COURT: Yes. You may approach whenever  
3 you need to.

4 MS. MEYERS: Thank you.

5 Q. (BY MS. MEYERS) I'm handing you what are marked  
6 as exhibits, just to facilitate a review: Exhibits D-1,  
7 D-2, and D-3.

8 I think the document you referred to -- the  
9 current document is marked as D-2. Could you pull that  
10 out? They're marked on the back.

11 A. Yes.

12 Q. What is that? Could you describe that document?

13 A. This is a breakdown by attorney of all the  
14 cases, again, that they have that have dates that are set  
15 beyond yesterday, because the report was run yesterday.

16 So, for instance, the first section covers Alex  
17 Bolobonoff. It shows how many cases he has set for  
18 arraignment and the date and the charge of the case. It  
19 shows how many cases he has set for case management, the  
20 type of charges and the date. Each type of setting, it  
21 shows how many cases he has set for that type of setting,  
22 what the charges are, and the future date.

23 Q. Did you run this report?

24 A. Yesterday morning, yes.

25 Q. So it's current as of December 12th, 2007?

1           A.       Six-thirty in the morning, yes.

2                   MS. MEYERS: Your Honor, we'd like to move  
3 into evidence D-2.

4                   THE COURT: It's ordered admitting into  
5 evidence Exhibit D-2 for purposes of this hearing only.

6                   (Exhibit D-2 was received into evidence.)

7                   MS. MEYERS: Thank you, Your Honor.

8           Q.       '(BY MS. MEYERS) I'd like to go through this  
9 document in some detail, Mr. Hlavac, to talk about what  
10 your individual attorneys are doing. So we'll -- I think  
11 the exhibit is in alphabetical order. We'll start with  
12 Mr. --

13          A.       Bolobonoff.

14          Q.       Bolobonoff. What type of cases does  
15 Mr. Bolobonoff handle?

16          A.       He generally carries a full felony caseload of  
17 everything except first degree murder.

18          Q.       And looking at this document, how many open  
19 cases did Mr. Bolobonoff have as of yesterday at 6:30  
20 a.m.?

21          A.       Sixty-four.

22          Q.       And what additional things does Mr. Bolobonoff  
23 do that are not counted in that 64 number?

24          A.       There are cases that are maybe assigned to him  
25 that went on warrant status. Because those don't have

1 future dates they're not included. If he has Rule 11  
2 clients where there's no future date because they're  
3 pending a Rule 11 evaluation, those are not shown on  
4 these -- this report.

5 If he had hearings probably on the 11th, they  
6 are not reflected on this report. And obviously none of  
7 his administrative responsibilities in terms of training  
8 or reading professional material or timesheets or anything  
9 else are listed in this report.

10 Q. So it's fair to say that his 64 open cases --  
11 the caseload doesn't reflect a more significant workload?

12 A. It does not reflect the workload. The pure  
13 number does not reflect the workload.

14 Q. Have you discussed Mr. -- with Mr. Bolobonoff  
15 his caseload?

16 A. Yes.

17 Q. And what -- what does he tell you about his  
18 caseload?

19 A. That he's maxed out and literally can't handle  
20 more cases.

21 We have an attorney, again, that just retired,  
22 another attorney who is on FMLA. And because of the  
23 contract situation we're trying to absorb those to the  
24 greatest extent possible. And he's been very good at  
25 taking some of those cases but has literally said he just

1 can't anymore.

2 The standard that we would do for a felony  
3 attorney to kind of target that 150 felony number is each  
4 felony attorney is expected to take three new arraignments  
5 a week. And that would take them to 156.

6 When an attorney feels overloaded we essentially  
7 turn the faucet down, reduce that number so the attorney  
8 can get back to a reasonable workload.

9 We've done that for Mr. Bolobonoff. He only has  
10 one future arraignment scheduled.

11 Q. Turning to the next attorney, Mr. Allen  
12 Elzerman, what kind of cases does Mr. Elzerman handle?

13 A. Allen handles the Lake Havasu City Justice Court  
14 on his own. He shares responsibility for the Kingman  
15 Justice Court. And he handles the initial stages of all  
16 felony preliminary hearing cases.

17 Q. How many active open cases does Mr. Elzerman  
18 have? And I think if you look at the back there's a  
19 summary chart.

20 A. A hundred sixty-two.

21 Q. As of yesterday at 6:30 a.m.?

22 A. Yes.

23 Q. Have you discussed with Mr. Elzerman his  
24 caseload, workload?

25 A. Yeah. I have an ongoing discussion with

1 Mr. Elzerman when I come in, in the morning and he's  
2 already there at -- before 7:00 a.m. and when I leave at  
3 6:00 or 6:30 and he's still there. We've had many  
4 discussions of his caseload.

5 Q. And what has he relayed to you about his  
6 caseload?

7 A. He just simply cannot do any more. Can't do it.

8 Q. Turning to the next attorney, Ms. Carlene Lacy,  
9 what kind of cases does Ms. Lacy handle?

10 A. Ms. Lacy handles all classes of cases, including  
11 she's currently second chair on a capital case.

12 Q. What -- and what are -- what number of active  
13 cases does Ms. Lacy have as of yesterday morning?

14 A. Thirty-three.

15 Q. And what -- what additional responsibilities  
16 does Ms. Lacy have that aren't reflected in that number?

17 A. She is the felony supervisor. Her  
18 responsibilities are to sit with the other felony  
19 attorneys, review the cases that they do take.

20 When -- I'll use Division V as an example. If  
21 Division V has nine arraignments scheduled in a week, we  
22 know currently with one attorney on FMLA we can only take  
23 three of those. Ms. Lacy's job is to go over those nine  
24 arraignments, sit with the attorney and make a  
25 determination of which of those three cases that attorney

1 can best absorb and maintain a workload which allows them  
2 to render effective representation.

3 Q. Have you discussed with Ms. Lacy her caseload  
4 and other responsibilities in the office?

5 A. I have.

6 Q. And what was her response?

7 A. A few weeks ago she was just about comfortable.  
8 And because she's been absorbing cases, she said she  
9 cannot continue to do both her administrative  
10 responsibilities and her cases effectively.

11 Q. Mr. Wallace, Charles Wallace, is the next  
12 attorney on the list. How many -- what does Mr. Wallace  
13 handle?

14 A. Mr. Wallace handled essentially class 3, 4, 5,  
15 and 6 felonies, depending on the nature of the charge and  
16 fact patterns.

17 Q. And I think you said handled. What do you mean?

18 A. Mr. Wallace is retired. He's no longer with the  
19 office.

20 Q. I take it any active cases Mr. Wallace is  
21 handling are not being handled by Mr. Wallace?

22 A. Somebody else is covering his cases or we have  
23 filed motions to withdraw. We could not absorb them.

24 Q. And what's the number on this list?

25 A. It's three on this list.

1           Q.       So the office is going to absorb or move to  
2       withdraw in those three cases?

3           A.       Yes.

4           Q.       Next attorney on the list, Clarence Jenkins,  
5       what kind of cases does Mr. Jenkins handle?

6           A.       Mr. Jenkins handles everything on a felony level  
7       except for homicides.

8           Q.       And how many open cases does Mr. Jenkins have?

9           A.       Twenty-nine as of yesterday.

10          Q.       And I think you mentioned that -- is Mr. Jenkins  
11       currently practicing in the office?

12          A.       Mr. Jenkins is currently on FMLA. Because we do  
13       not know if he will be back we are treating those cases as  
14       if he will not be back. And if he returns from his FMLA  
15       we will integrate him back into the caseflow. But in the  
16       meantime we're trying to, again, either absorb, re-assign,  
17       or withdraw from those 29 cases.

18          Q.       You're the next attorney on this list,  
19       Mr. Hlavac. And what kind of cases do you handle?

20          A.       Primarily only homicide, although I will take  
21       lesser cases if it's to help somebody out or they're not  
22       able to cover a hearing, I'll do some of that. Sometimes  
23       if someone has a particularly difficult client and they  
24       want help I will take that case from them as well.

25          Q.       And how many open cases do you have?

1           A.       I believe there are four in this report and  
2       there's one that's not reflected in the report, so it's  
3       five.

4           Q.       And all serious felonies?

5           A.       In all honesty I know of three of the cases that  
6       are on there; I don't know what the other cases are. I  
7       think that they've been given to me, but I haven't had a  
8       chance to look at them. The three that I know of, two of  
9       them are first degree murder and one is second degree  
10      murder.

11          Q.       And you've already described the other things  
12      that you do that are not involved in the active  
13      representation of a defendant. In light of all those  
14      things, how do you feel about your caseload, workload?

15          A.       I would not be able to render effective  
16      representation to any additional people. Many times I  
17      question whether I'm doing what I should be doing on the  
18      cases I have.

19                 Again, the goal when I take a serious case is to  
20      take on a more junior attorney and help them, mentor  
21      and -- learn the case. We haven't had junior attorneys,  
22      so there's been nobody to assist with those cases.

23                 Frankly, I have an annual report that was due to  
24      my bosses December 1st I haven't had a chance to finish.  
25      There are a lot of things I have not done administratively



1 and -- for -- my boss is the department head and then the  
2 county manager -- that I should have done that I just have  
3 not had time to do.

4 Q. The next attorney on the list is David Corbett.  
5 What kind of cases does Mr. Corbett handle?

6 A. Mr. Corbett is primarily misdemeanors, although  
7 he's starting the transition into felonies. I expect him  
8 to be assigned full time to a felony court roughly January  
9 1st.

10 Q. How many years of experience does Mr. Corbett  
11 have?

12 A. One year.

13 Q. How many open cases did he have yesterday  
14 morning?

15 A. A hundred and twenty-five.

16 Q. In addition to those 125 open cases, what other  
17 responsibilities does Mr. Corbett have?

18 A. Again, the same as everyone else. He has to  
19 continue to read professional material, he has to keep up  
20 on training. He is honestly kind of the senior person in  
21 justice court that all of the interns come to. He's  
22 currently mentoring the five unlicensed interns that we  
23 have, a lot of other things.

24 Q. Have you discussed with Mr. Corbett his workload  
25 and caseload?

1           A.       Yes.

2           Q.       And what was his response?

3           A.       He's overwhelmed.

4           Q.       Could he take any more cases?

5           A.       No.

6           Q.       Next attorney on the list is Jabron Whiteside.

7       What kind of cases does Ms. Whiteside handle?

8           A.       Jebbie, again, handles primarily misdemeanor  
9       cases. She is also beginning the transition into felony  
10       court. I expect her to be a felony deputy roughly mid-  
11       January, late January, early February time frame. She  
12       currently carries less than a handful of felony cases.  
13       The rest are all misdemeanors in the Kingman Justice  
14       Court.

15          Q.       What's her -- how long has Ms. Whiteside been  
16       licensed?

17          A.       Under a year.

18          Q.       And I assume she's got the same additional  
19       duties as the other young attorneys in the office?

20          A.       Yes.

21          Q.       Could you describe those?

22          A.       Again, she mentors the younger -- the interns,  
23       goes over cases with them, discusses with them her  
24       strategies, the things she's doing; she takes them with  
25       her on client interviews, witness interviews, tries to

1 demonstrate to them good practices, and then sits down  
2 with them afterwards, addresses the things they liked or  
3 didn't like and answers their questions.

4 Q. Have you discussed with Ms. Whiteside her  
5 caseload?

6 A. Yes.

7 Q. And what was her response?

8 A. That she is at capacity.

9 Q. The next attorney on the list Mr. Steffen, Jason  
10 Steffen?

11 A. Yes.

12 Q. What kind of cases does Mr. Steffen handle?

13 A. Solely misdemeanor cases.

14 Q. How experienced is Mr. Steffen?

15 A. A week and a half.

16 Q. I see that in a week and a half he's got 17  
17 active, open cases.

18 A. Correct.

19 Q. Is that more than you would have liked to have  
20 assigned him as the supervisor in the office in a week and  
21 a half?

22 A. Honestly to answer that question I'd have to see  
23 what kind of cases they were and when they're set. My  
24 expectation is they're set about 30, 40 days off. He's  
25 being directly mentored by David Corbett. David will help

1 him through those 17 cases. That's part of the  
2 transitional period that -- actually, Jason Steffen is  
3 being mentored by Jebbie. Excuse me.

4 Jebbie will work with him on those 17 cases.  
5 And it's only when she's comfortable that he's able to  
6 take on those new cases, do a good job with clients, do a  
7 good job with the courts that she'll start moving up into  
8 felonies and he'll take on a heavier load.

9 Q. Could Mr. Steffen take more cases?

10 A. Not in the big picture, no. He could take them  
11 but he'd have no mentoring. He wouldn't be effective if  
12 he took more cases, no.

13 Q. The next attorney on the list is Kathryn  
14 Tuthill. I may have --

15 A. Ms. Tuthill, yes.

16 Q. What kind of cases does Ms. Tuthill handle?

17 A. She handles a juvenile caseload.

18 Q. And how many active cases does she have?

19 A. Thirty-four.

20 Q. And what other duties does Ms. Tuthill have in  
21 the office?

22 A. The same other duties as everybody else in terms  
23 of timesheets, administrative, professional materials.  
24 But I think it's important to note that the juvenile  
25 attorneys also now cover the juvenile drug court. So

1 there's an extra three weeks -- three hours a week that  
2 they are spending on juvenile drug court: meeting,  
3 discussing with clients and then traveling and attending  
4 drug court.

5 Q. Not reflected in the 34 open cases?

6 A. No.

7 Q. Have you discussed with Ms. Tuthill her  
8 caseload?

9 A. Yes.

10 Q. And what did she express to you?

11 A. That her caseload is appropriate but that she  
12 would not want to absorb more cases and still render  
13 effective representation.

14 Q. And to clarify, the attorneys that you polled in  
15 your office -- all of the attorneys you polled in your  
16 office, when they say in their view they can't take  
17 additional cases, is this with respect to their inability  
18 to render competent, effective representation?

19 A. Yes.

20 Q. The last attorney on this list is Melissa Puett?

21 A. Yes.

22 Q. And what kind of cases does Ms. Puett handle?

23 A. Again, she handles juvenile cases.

24 Q. What additional duties does Ms. Puett have?

25 A. Ms. Puett's primary responsibility is to

1 interact -- she's considered the juvenile supervisor. So  
2 she is supposed to interact and coordinate with juvenile  
3 probation, juvenile detention center, make sure that  
4 administratively and systemically our clients, our  
5 juvenile clients, are being served and getting what they  
6 need and getting the services they need.

7 She also represents the juveniles on the Foster  
8 Care Review Board and serves in that capacity.

9 Q. And that's not reflected in the 33?

10 A. No.

11 Q. And just for the record, how many active cases  
12 does she have?

13 A. She has 33. She also does the juvenile appeals.

14 Q. And do you know how many juvenile appeals she  
15 has?

16 A. I believe she has two pending.

17 Q. There is an additional attorney in your office  
18 not on this list. Jill Evans, I believe?

19 A. Yes.

20 Q. And what --

21 A. There's actually two that are not on the list.  
22 The other one is Jason Ricke.

23 Q. Let's talk first about Ms. Evans.

24 A. Okay.

25 Q. What does Ms. Evans do?

1           A.       Ms. Evans does the appeals and post-conviction  
2 relief.

3           Q.       And do you know how many active -- how many open  
4 cases Ms. Evans has?

5           A.       As of a few days ago she has 22 pending appeals  
6 and just over 20 PCRs that she's reviewing.

7           Q.       Are there any additional duties that wouldn't be  
8 reflected in those numbers that Ms. Evans has?

9           A.       Only that she coordinates with appellate  
10 contractors that have existing appellate cases out there.

11          Q.       And have you discussed with Ms. Evans her  
12 caseload and workload?

13          A.       Yes, on an ongoing basis.

14          Q.       And what is Ms. Evans' view of her caseload?

15          A.       That she needs relief because -- she needs to  
16 send some cases out to contract appellate attorneys  
17 because she's risking not meeting deadlines.

18          Q.       And the other attorney you referred to?

19          A.       Is Jason Ricke, who got his bar number  
20 yesterday.

21          Q.       To your knowledge, does Jason Ricke have any  
22 cases?

23          A.       He's probably being assigned some this morning,  
24 yes.

25          Q.       And I don't think I asked this question, but,

1 Melissa Puett -- have you talked to her about her  
2 workload?

3 A. Yes.

4 Q. And what was her view?

5 A. That she is currently able to provide effective  
6 assistance of counsel but if she were to take on  
7 additional felonies or misdemeanors she would not be able  
8 to do so.

9 Q. And those are all the licensed attorneys in your  
10 office?

11 A. Yes.

12 Q. And to summarize, you've discussed with each of  
13 them their caseloads and workloads, and they all conclude  
14 that they can't take on additional cases?

15 A. Yes.

16 Q. Because they would jeopardize their ability to  
17 render competent and effective assistance?

18 A. That's correct. They wouldn't have the time to  
19 prepare, do the research and all the things that are  
20 necessary in order to provide effective representation.

21 Q. What's roughly the rate -- and I know you  
22 can't -- it's not in your control and it's perhaps not  
23 consistent week to week or day to day -- what's the rate  
24 of incoming cases in your felony, juvenile, and  
25 misdemeanor divisions?



1           A.       Misdemeanor divisions, they're probably getting  
2   80 cases a week, at least.  Felonies -- we're probably  
3   seeing 30 to -- 30 to 40 felonies a week.  And -- at the  
4   superior court level.  At the prelim level probably closer  
5   to 60 or 70 cases a week or every other week.

6           Q.       And I think you have mentioned two attorneys  
7   that do felonies.  Was that right or --

8           A.       Currently?

9           Q.       Yes.

10          A.       There's three including myself.

11          Q.       And 30 felonies between three people a week,  
12   roughly -- between two people a week?

13          A.       Correct.

14          Q.       And I believe you said you can absorb no more  
15   than three a week?  That's your macro plan?

16          A.       That's the plan, right, depending -- but we  
17   still go back and look at what the attorney is carrying.  
18   In that D-2, the charts kind of show a breakdown of what  
19   the cases are set for.

20                 And if an attorney is carrying what looks like a  
21   heavy caseload but a lot of it is a change of plea or a  
22   judgment and sentencing, status, then we don't get too  
23   concerned unless the attorney is expressing concern.

24                 On the other hand, if they have a lot of cases  
25   set for trial or case -- or omnibus hearings we get real

1 concerned that they're not going to be able to go with  
2 that caseload.

3 So even their ability to take those three  
4 depends on the other cases that they're carrying.

5 Q. Are you able to in your office absorb the  
6 roughly 80 misdemeanors a week, I think you mentioned?

7 A. We do.

8 Q. Are you able to do that competently and  
9 effectively?

10 A. We probably do not.

11 Q. Juvenile cases, I don't think you mentioned the  
12 rate at which those are coming in.

13 A. Juvenile cases probably come in about eight a  
14 week.

15 Q. Can you absorb those eight cases?

16 A. As long as they're clearing other cases, yes.

17 Q. What -- what prompted -- or describe how your  
18 office has come to file these motions to withdraw. And my  
19 count is probably off, but pending in this division, which  
20 includes some cases consolidated from Judge Jantzen, are  
21 in excess of 20 cases, and pending before other judges,  
22 who I understand are not ruling until after Judge Conn  
23 determines -- rules on these motions, perhaps in excess of  
24 40 or 60 motions to withdraw, how did you come to file  
25 those motions to withdraw?

1           A.       We look at what our caseload is and how many  
2 cases we can absorb. I have to kind of go backwards and  
3 say that in roughly fiscal year 2003 we were able to  
4 achieve appropriate staffing for 2003. We were able to  
5 staff up. We did pretty well in 2003 and 2004.

6                   Beginning in 2005 we saw an increasing amount of  
7 cases. We went back to the County and asked for  
8 additional personnel. Were given, I believe, a paralegal  
9 and a mitigation specialist over that time period. And  
10 that was it; no new attorneys.

11                  We would continue to ask for additional staff.  
12 I believe we asked for five attorneys in fiscal year 2006  
13 and nine attorneys in 2007. In 2007 we got one.

14                  So our staffing hasn't kept up with the need  
15 to -- the amount of attorneys we need to absorb those  
16 cases internally.

17                  Now, historically we've had the administrative  
18 ability to simply look at a case and say: "We can't  
19 absorb this case" and we would administratively withdraw  
20 and re- assign it to a contract attorney.

21                  I have had responsibility to assign contracts  
22 and choose when they go out, because there has  
23 traditionally been money there. In the '03, '04 time  
24 period we were always under budget for those contracts.

25                  In the '04 period we experienced a period where

1 we were going to go over those. We went to the board of  
2 supervisors, asked for a contingency transfer, and that  
3 was made.

4 In the preceding year -- succeeding year --

5 Q. 2005?

6 A. Yes. We were told: "Don't worry about that  
7 contingency transfer. We know we have to pay the  
8 contracts. Write the contracts. At the year end we'll  
9 balance it out."

10 And that's what happened. At the end of the  
11 year it was all balanced. There was a lump sum  
12 contingency transfer that was made by the board, and that  
13 covered the excess monies that were paid on essentially  
14 overflow contracts.

15 That has happened, that ability has stayed with  
16 us. Nothing has really changed. We've continued to do  
17 that.

18 If a legal defender said they couldn't handle a  
19 case, same thing, we would just send it out on contract.

20 This year the County came to a realization in  
21 roughly October that state shared sales tax revenue,  
22 vehicle registration dollars, new construction dollars,  
23 property tax increases were not keeping up with the  
24 projected revenues, at which point the county manager and  
25 the finance director said: "Well, we can't just keep

1     spending." So that -- they could not rely on the good  
2     revenues at the end of the year to continue to make that  
3     contingency transfer.

4             So they essentially put a hiring freeze on the  
5     County to make sure we had some money left over at the end  
6     of the year and also said not to write any additional  
7     contracts.

8             Q.     October of this year?

9             A.     Yes.

10            Q.     How much had the County been spending on these  
11     contract-cases the last fiscal year, which would have been  
12     fiscal year 2007?

13            A.     Fiscal year 2007 we spent \$700,070 on outside  
14     contracts.

15            Q.     Is that reflected in your office's budget?

16            A.     It's not. Again, going back historically, in  
17     2000 the courts had sued the County over mandated costs.  
18     There was kind of an uneasy settlement, that the County  
19     realized it was just going to have to pay those mandated  
20     costs.

21            As a result of that we had a flat line item for  
22     the overflow contracts of 150,000. And it was understood,  
23     we were instructed, "Just write the contracts, and we'll  
24     balance it at the end of the year."

25            So during the budget process, when we would ask

1 for five people, we would say, you know, "If you don't  
2 give us the resources you're just going to spend it on  
3 contracts."

4 And the response was: "Well, do what you can.  
5 We just don't have the money. There's too many people  
6 asking for money, there's too many new initiatives to do  
7 it."

8 Q. And so after the ability to write contracts  
9 which you would write to relieve the burden on your office  
10 of excessive caseloads was taken away, you filed these  
11 motions to withdraw?

12 A. Correct. At that point ostensibly we had no  
13 alternative. We continued to do what we had always done.  
14 The difference was we previously had the power to do it  
15 administratively, no longer had the power to provide  
16 alternative counsel; we still had to withdraw from cases.  
17 The only difference now is that now we need to ask the  
18 Court's permission because essentially our administrative  
19 permission has been taken away.

20 Q. What efforts have you made to engage substitute  
21 counsel for the defendants who you can't take in your  
22 office?

23 A. For defendants who have multiple cases, in other  
24 words, they may have already had a case and there was a  
25 contract attorney -- and I thought I saw one who's done

1    this -- if they picked up a new case, we'd actually call  
2    that contract attorney and kind of beg them to take the  
3    new case essentially pro bono. And there was a few  
4    attorneys that voluntarily did that.

5               In addition, we spoke with Mr. Gilleo and asked  
6    if his office would start to absorb some of the cases that  
7    traditionally would have been overflow. And he agreed to  
8    do that. And they've taken on several dozen cases. But  
9    even they are at capacity and have turned cases back.

10           Q.     And what's Mr. Gilleo's role? What's his --

11           A.     Mr. Gilleo is the head of the Legal Defender's  
12    Office, which is the conflict office for the County.

13           Q.     We've talked a little bit about the contract. I  
14    don't think we've actually described what that is. But  
15    when you say contract, what do you mean?

16           A.     If there's an attorney who wishes to get a  
17    contract with the County, the County Attorney's civil  
18    office prepares the contract, it goes before the board of  
19    supervisors, the board of supervisors approves that  
20    contract. It's actually a contract with the County.

21               All we do is essentially send what's called a  
22    contract addendum which identifies the specific case and  
23    the rate under that contract that the attorney is going to  
24    be paid.

25               So we don't -- we don't have the contract. I

1 don't have the power under procurement law to issue any  
2 contacts.

3 Q. But you would administer on behalf of the County  
4 that system?

5 A. Correct.

6 Q. And these cases that your attorneys and your  
7 office can't handle, the office can't handle because they  
8 are at their capacity under the rules that you've  
9 described, what isn't happening?

10 A. Everything is not happening. You know,  
11 essentially we've been kind of in this limbo where we've  
12 been told "You can't withdraw. You still represent the  
13 person." But that doesn't create more time, it doesn't  
14 create magic resources for us to do anything on these  
15 cases.

16 We had a case yesterday in this division where a  
17 client, because they'd been shipped paperwork by a  
18 secretary, had said they wanted to take a change of plea.

19 The Court set it for a change of plea. I  
20 appeared because we are still counsel but essentially had  
21 no basis to advise that client, hadn't had an opportunity  
22 to review the police reports, do any kind of  
23 investigation, review whether it was an appropriate plea  
24 offer, advise her of what the sentencing ramifications  
25 were if she took it or didn't take it.



1           And that's going on on every single one of those  
2 cases.

3           Q.     And those, consultation with the client or  
4 investigation, are required by --

5           A.     Absolutely. Under ER 1.2 and 1.4 we can't just  
6 take a charge in a plea offer and tell the client: "Well,  
7 this looks good. You ought to take it."

8                   You can't do it ethically. We have to do  
9 certain things. And it's in all the standards: the  
10 Department of Justice standards and the Compendium of  
11 Indigent Defense standards, it's in every state set of  
12 standards, NLADA standards, and it's absolutely reflected  
13 in the Arizona ERs, in 1.2 and 1.4, in the comments, that  
14 you can't advise a client on whether to take a plea or not  
15 unless you've done sufficient preliminary work to give  
16 them good advice. And we simply don't have the time and  
17 the resources to do that.

18          Q.     If the situation continues unabated -- and by  
19 "situation" I mean you're not permitted to withdraw in  
20 other cases, because of the caseloads that your attorneys  
21 carry, what's -- what's the effect on your performance as  
22 attorneys?

23          A.     You know, what we're essentially asked to do is  
24 choose between clients: which ones are you going to  
25 provide effective representation to and which ones aren't

1     you going to?

2                 What we cannot do -- and I refuse to let my  
3     attorneys do -- is compromise the level of representation.  
4     They can't do it ethically. They can't just say, "Well,  
5     let's take the same number of work hours, the same amount  
6     of energy and just spread it over more clients" because  
7     then they're not doing the job they should for all those  
8     clients.

9                 So essentially we are forced to choose clients  
10    that we will represent and clients that on paper we  
11    represent but which, in fact, we simply show up at court  
12    and continue to ask for continuances in the hope that some  
13    day relief will come.

14                Q.     And you mentioned your -- assistance of counsel.  
15    Will you and the attorneys in your office be able to  
16    render effective assistance of counsel in these cases if  
17    you are to continue on them?

18                A.     No, we're not. We're not. We will not.

19                Q.     And in a post-conviction or a collateral  
20    proceeding attacking any conviction would you be willing  
21    to testify to that, as to the nature of your  
22    representation?

23                A.     Would I be freely willing to walk in and say it?  
24    No. I don't want to take any adverse action to the  
25    County. But push come to shove, if I were forced to

1     testify about the level of representation on any of those  
2     cases, I would have to say that.

3             Q.       Say what?

4             A.       That any representation we provide to those  
5     people was below the standard of professional diligence  
6     and care and ineffective.

7                     MS. MEYERS: Your Honor, I'm essentially  
8     through examining Mr. Hlavac. But if there are other  
9     factual areas which you would want us to talk about I'd be  
10    happy to have Mr. Hlavac go into them. Or if --  
11    --obviously, if you have -- questions the Court would like  
12    to ask Mr. Hlavac.

13                    THE COURT: Well, I do have some questions.  
14    And I think maybe this is how you all got to be here in  
15    the first place. Maybe a short break would be appropriate  
16    now, because we've been going for a while. So let's take  
17    maybe a five-minute break and then come back in.

18                    And if I can just make some preliminary  
19    comments. I have questions that I want to ask of  
20    Mr. Hlavac. Some of these I already know the answers  
21    because they're in the materials that are part of the  
22    file. But I just think that for people who maybe don't  
23    have the patience to read through these items it would be  
24    good to have these things stated on the record.

25                    And I really want to make this as little an

1   adversarial process as possible, but I think there are  
2   things that it would be helpful to just have on the record  
3   so that whatever decision I ultimately make will maybe be  
4   capable of being understood. And there's just a few areas  
5   that I just want to develop a little bit.

6               So let's take a five-minute break and then we'll  
7   resume.

8               (The proceedings recessed  
9               from 10:13 a.m. to 10:20 a.m.)

10              THE COURT: Thank you. Be seated.

11              This kind of reminds me of the judicial  
12   conference, when it takes 15 minutes for everybody to come  
13   back in. But hopefully it won't be exactly like that.

14              This is a continuation of CR-2007-1492, Wayne O.  
15   Hall, et al.

16              And, Mr. Hlavac, interestingly, I have the list  
17   of questions that I was going to ask you six weeks ago,  
18   and I think you've probably answered every one of them  
19   during your testimony, but the other pleadings that have  
20   been filed have raised a couple of other questions in my  
21   mind.

22              And, again, these are things that I think need  
23   to be addressed because I know that if I don't ask some of  
24   these questions -- and some of these are questions that  
25   I've just been asked informally by people. And I know

1 there's some things that the people involved in the system  
2 would want to have answered. And if I don't ask you now,  
3 someone later is going to say: "Well, why didn't someone  
4 ask Mr. Hlavac this?" So just bear with me.

5 And I guess to place this in a context,  
6 Mr. Hlavac, if I understand correctly, you're saying that  
7 you are budgeted for a number of positions, that if you  
8 were able to fill them you would be able to provide  
9 effective representation.

10 So am I correct in understanding that you're  
11 telling us that this is not a budgeting issue; this is  
12 more a recruitment and a retention issue?

13 THE WITNESS: No, sir, that's incorrect.

14 THE COURT: All right. Where -- because I  
15 wasn't -- I may have misunderstood. When you said how  
16 many positions you were budgeted for, I assumed that that  
17 meant that the County had authorized funding for these  
18 positions. And I may have been confused about your  
19 reference to positions and maybe not distinguishing  
20 between positions and licensed attorneys.

21 So is part of the problem that the County will  
22 not pay for attorneys that you would be able to go out and  
23 hire if you had the money?

24 THE WITNESS: It's a dual problem. If I were  
25 fully staffed at the 21 authorized positions we had, we'd

1 still be turning away cases on overflow.

2 As of -- as of the end of the fiscal year 2007  
3 we needed an additional 13 attorneys to handle the cases  
4 that were projected for FY 2008. We trimmed that down to  
5 nine attorneys, two interns, some paralegals, because I  
6 believe we can handle that caseload if we had those  
7 authorized positions and could fill them.

8 So there is a function of how many people you  
9 have on staff and how many people are licensed, but it's  
10 not just that as a function. The particular problem that  
11 brings us here today is solely a budget function.

12 THE COURT: All right. And you mentioned  
13 interns throughout your comments. And maybe it's not  
14 clear to everyone what an intern is.

15 THE WITNESS: An attorney intern is someone  
16 who has graduated from law school and has sat for the  
17 Arizona Bar exam or is waiting to take the Arizona Bar  
18 exam but is not yet licensed.

19 THE COURT: And are they actually paid by the  
20 County?

21 THE WITNESS: They are paid a reduced rate.  
22 I believe they will make roughly 36 or 37,000 a year.

23 THE COURT: All right. Let me just ask the  
24 obvious question. Wouldn't it be better to hire attorneys  
25 that could actually work as attorneys and take some of

1    this caseload rather than paying money, limited money, to  
2    people who cannot act as attorneys?

3                   THE WITNESS: Absolutely. And we try to  
4    recruit people who are licensed to come in. We've had  
5    six, seven, eight people come up in the last six months  
6    and none of them have ultimately decided they wanted to  
7    work in Mohave County.

8                   THE COURT: What are the prospects for this  
9    situation being alleviated in the future? Is there a  
10   light at the end of the tunnel? You've mentioned that  
11   Ms. Whiteside will be taking cases in mid-January; you  
12   mentioned Mr. Ricke just became licensed yesterday. Is  
13   this going -- should we envision a permanent situation  
14   where the Public Defender's Office handles maybe 40 to 50  
15   percent of the cases and all the rest of them are assigned  
16   by the court or do you see something better happening in  
17   the near future?

18                   THE WITNESS: Well, I can tell you what I've  
19   presented to Office of Management Budget and the county  
20   manager, finance director. In order to appropriately run  
21   the office you must count on roughly a 25 percent vacancy.  
22   If you are only going to staff to the number of attorneys  
23   you need, that means you're never going to have all the  
24   attorneys you need, much less if you staff to less than  
25   you need; that exacerbates the problem.

1           In order to cure this problem -- it is a pure  
2   budgetary function. You're never going to cure the  
3   overall turnover; you're never going to cure the issues  
4   with people wanting to move on to better employment,  
5   better salaries, or, frankly, being burnt out on being  
6   public defenders.

7           That means that you not only need to staff to  
8   what you need to handle the caseload but you should over-  
9   staff to account for the fact that you're going to have  
10  vacancies which are then part of the recruiting process.

11          So to manage it appropriately it is a pure  
12  budget function. I cannot look in a crystal ball and tell  
13  you whether that will happen or will not happen.

14          I know that with the passage of property tax  
15  caps last year the County is not in a good financial  
16  position. This is not a problem -- and I think Professor  
17  Lefstein is going to emphasize this -- this is not a  
18  Mohave County problem; it's everywhere. And until we come  
19  up with a solution of how to fund it and better run it as  
20  a system I can't tell you what's going to happen.

21          I can tell you that for my part we're certainly  
22  going to have more licensed attorneys. But as soon as I  
23  say that I'll walk back to my office and somebody will  
24  have resigned because they have an offer Back East or  
25  somewhere else, so -- there are things we cannot control.



1           When we recruited last year we were expecting to  
2   be 100 percent full by this time. After we sent out those  
3   offers and the recruiting season was full we lost four  
4   employees. So that created four vacancies that we can't  
5   fill for a year and a half unless we get a lateral  
6   transfer to come in. And just, frankly, have not had good  
7   luck doing that.

8           THE COURT: On the issue of retention -- and  
9   this will probably be the most potentially offensive and  
10  subjective question that I ask you, but, historically it  
11  seemed like before you got here the Public Defender's  
12  Office seemed to be able to maintain a full staff.  
13  Mr. Gilleo's office seems to be able to maintain a full  
14  staff. You had a pretty decent staff up until several  
15  years ago. At least that's my perception.

16           Is there -- can you identify anything, whether  
17  it's bad water or your new building or some person that  
18  works in your office, that is driving people away? Are  
19  you aware of anything that is creating a hostile  
20  environment that causes people not only to leave your  
21  office and go to Phoenix where there's a better social  
22  life and to get paid more money but to actually leave your  
23  office and stay here and go to work for other places doing  
24  the same thing? Is there a systemic problem that is  
25  causing there to be a retention problem within the last

1 couple of years that you're aware of?

2 THE WITNESS: There's a lot of issues that  
3 have gone on. When we went to -- took our staff from 11  
4 to 21 authorized attorneys we didn't get new facilities.  
5 So we filled up the old facilities to which in a space  
6 equivalent to this jury box we would have six attorneys  
7 working in cubicles back to back. When they pulled their  
8 chairs back they'd hit each other.

9 That is not a conducive work environment for a  
10 professional, licensed person with over \$100,000 in debt.  
11 The building itself has been an absolute detriment.

12 The new building, which we only moved into in  
13 March of this year, has significantly improved the morale.  
14 Significantly improved the morale.

15 As to why people leave for individual reasons,  
16 there are -- you know, I can see one person in the room  
17 who has left our office and is still working. And she's  
18 in private practice and doing contract work, and that  
19 seems to suit her very fine. As to her reasons why she  
20 left I don't know. You'd have to ask her.

21 I know that we've had a lot of people who have  
22 left to go to the County Attorney's Office for higher pay,  
23 they've gone to the City of Kingman for higher pay. We've  
24 had people leave and go to Legal Services for lower pay  
25 because they just didn't want to be public defenders.

1 I think that -- you know, I got an e-mail from  
2 one of our attorneys that kind of sums up how difficult it  
3 is when he says: "How many times have we met with a  
4 client and been told 'Yeah, you know what? I want a real  
5 attorney.'"

6 And that's the environment my attorneys deal  
7 with. It's not easy being a public defender. They're not  
8 respected. It's sometimes an attitude that's reflected by  
9 the bench, by prosecutors, by the community. And we  
10 strive to make that better. We continue to strive to make  
11 improvements.

12 Heavy caseloads, people feeling like they never  
13 got training -- I know that several of our attorneys have  
14 done exit interviews with the county manager, and he's  
15 referred back to me that people are saying they feel like  
16 they have no support. They've been handed a stack of  
17 cases and sent to court. And that's inappropriate,  
18 period.

19 We are trying to do that better. We continue to  
20 improve. We continue to improve every day.

21 So is there light at the end of the tunnel?  
22 Yes. A lot of it depends on the finances of the County.

23 THE COURT: How long do you think that you  
24 have to train someone -- for example, let's take Jason  
25 Ricke who just got his bar number yesterday. How long do

1     you project that it would be before he could step into a  
2     superior court and actually have a felony caseload?

3                 THE WITNESS: I would project six to 36  
4     months. Historically that's what it's been in our office.

5                 THE COURT: So it could -- potentially it  
6     could be three years before he is handling felony cases?

7                 THE WITNESS: That's correct.

8                 THE COURT: All right. And what would be  
9     happening during that period of time to make him able to  
10    handle felony cases?

11                THE WITNESS: He'd be being trained; he'd be  
12    being mentored; he'd be going through advocacy schools,  
13    things that teach him how to do whatever skills he's  
14    lacking better.

15                We've had one attorney who moved up in six  
16    months. And he was an extraordinary young man that was  
17    just gifted with a lot of skills. Generally speaking --  
18    and I know David Corbett is back there, and I don't want  
19    to single him out, but he's an excellent, excellent young  
20    attorney.

21                If you were to ask David Corbett: "Do you feel  
22    fully competent at the misdemeanor level?" he'd say, "You  
23    know, I'm just starting to get it."

24                Well, the reality is we're going to move him to  
25    felonies. Is he ready to handle a full felony caseload?

1 Absolutely not. He will start getting low-grade felonies,  
2 class 4's, 5's, and 6's, he'll get hands-on monitoring  
3 from Ms. Lacy and myself, and he will progress as an  
4 attorney to the point, quite frankly, that I expect he'll  
5 be handling homicide cases by himself in maybe two to four  
6 years.

7 THE COURT: And I know that you were present  
8 at a meeting where this was discussed, and I don't want to  
9 single people out and compare you to other people, but we  
10 heard Ron Gilleo from the Legal Defender's Office say that  
11 his training method is that people just follow him around  
12 for a while and then he turns them loose and they're  
13 handling felony cases. And I apologize, maybe it sounded  
14 a little more sophisticated than that when he was  
15 explaining it.

16 Does that sound like it's an acceptable  
17 alternative to how you propose to train someone like  
18 Mr. Corbett?

19 THE WITNESS: It is not, in my ethical  
20 opinion.

21 THE COURT: A question that I've heard  
22 asked -- and I think I know the answer to this, and it's  
23 certainly in the materials, but -- on the cases that have  
24 been sort of put on hold for the last five or six weeks,  
25 many of which involve people that are in custody who are

1 receiving virtually no representation while this issue is  
2 pending, wouldn't it have seemed appropriate to have re-  
3 allocated resources in your office and said, "Let's put  
4 some of these misdemeanor cases on hold and let's maybe  
5 re-allocate some people to go over to the jail and talk to  
6 these people just so that they can have some sense that  
7 they're being represented"? What would be the flaw in  
8 that thinking?

9 THE WITNESS: Well, what you're essentially  
10 proposing is that I sacrifice one set of clients for  
11 another set. And I'm unwilling to make that decision.

12 The misdemeanor clients Mr. Corbett,  
13 Ms. Whiteside, and Mr. Elzerman represent have ongoing,  
14 existing relationships.

15 One of the top ten principles of indigent  
16 defense is that you maintain vertical representation. So  
17 the same attorney is supposed to represent that person  
18 from start to finish in a case. To take an attorney off  
19 and just say: "Well, sorry. We've represented you  
20 halfway through. Good luck" is unacceptable.

21 To suggest that we simply don't represent one of  
22 the misdemeanor courts is fiscally irresponsible. It  
23 costs us roughly \$60,000 more in contract fees to send out  
24 an entire attorney's caseload of misdemeanors than it does  
25 to send out an entire attorney's caseload of felonies.

1           So while the ethics and the rules are important  
2   in terms of the quality of representation we provide, I  
3   have a dual responsibility. I also have a fiscal  
4   responsibility to my employers, the board of supervisors  
5   and the county manager, to manage the tax dollars in the  
6   wisest, smartest situation.

7           Additionally, to take a young attorney who is in  
8   the middle of his training, is comfortable with the cases  
9   he has and say: "Drop what you're doing. We're going to  
10  shift all your responsibilities into something you've had  
11  no training with" would create a scenario that that  
12  attorney is more likely to leave because he doesn't feel  
13  stable -- he or she does not feel stable in his career.

14          To take a misdemeanor attorney and send them  
15  into a jail to discuss a felony case with an incarcerated  
16  individual is unacceptable. That attorney may not know  
17  what the collateral consequences of a felony conviction  
18  are, they may not know what all of the rules, the case  
19  law, and everything else dealing with that type of  
20  particular felony case are. And I will not allow my  
21  attorneys to provide ineffective representation.

22          THE COURT: You mentioned one thing that I  
23  actually didn't understand. You said that some of the  
24  time that your attorneys spend is spent on not only  
25  reviewing professional materials but timesheets. I really

1 didn't have any idea what you were referring to.

2 THE WITNESS: My attorneys track their actual  
3 hours worked. It's important for us to know -- and when  
4 we look at the workload we have to know are they putting  
5 in an 80-hour week and complaining they're overloaded --  
6 or an 80-hour pay period or are they putting in a 90-hour  
7 pay period and complaining they're overloaded.

8 There's a big difference in how we're going to  
9 address that employee based on the amount of time they're  
10 putting in.

11 We track that time. The attorneys are  
12 responsible for tracking their time. They do it down to  
13 the tenth of an hour.

14 We try to keep those time records sufficiently  
15 so that we could go back, look at that attorney's  
16 caseload, the amount of hours he's put in over a year, and  
17 determine this is what that attorney has been averaging on  
18 a per-case basis.

19 We can compare that with other studies that have  
20 been done, weighting studies, both in this state, in Pima  
21 County, in Maricopa County, North Carolina, Georgia,  
22 Louisiana, and compare how do we compare with other  
23 jurisdictions.

24 So those are very important functions that they  
25 do.



1                   THE COURT:  So you're doing sort of like  
2  billable hours but you're doing it more for management  
3  purposes?

4                   THE WITNESS:  That's correct.

5                   THE COURT:  All right.  And your attorneys  
6  get paid a salary and do not get paid on an hourly basis,  
7  correct?

8                   THE WITNESS:  That's correct.

9                   THE COURT:  Do you have -- and maybe these  
10 timesheets that you're referring to would answer my  
11 question, but do you have an expectation that -- are  
12 attorneys hired with the expectation that this is a 40-  
13 hour-a-week job or do you have expectations that they  
14 should work at least 60 or 70 hours a week?  What do you  
15 tell your attorneys as far as how long you expect them to  
16 work?

17                   THE WITNESS:  What the attorneys are told is  
18 that they're expected to work a minimum of 40 hours a  
19 week.  If I have an attorney who's consistently putting in  
20 more than 40 hours a week, I'm concerned about, one, that  
21 attorney's caseload is too high or whether that attorney  
22 has sufficient training, skills, and ability to handle the  
23 caseload and work that he has.

24                   THE COURT:  Do you have -- do you have people  
25 in your office that actually work no more than 40 hours a

1 week?

2 THE WITNESS: On occasion, yes.

3 THE COURT: On a regular basis?

4 THE WITNESS: Not on a regular basis.

5 THE COURT: All right. I know that  
6 informally you have on many occasions expressed the -- as  
7 you've done here today, the concern about liability for  
8 providing ineffective representation; you've expressed a  
9 concern about cases being reversed in Rule 32 proceedings.

10 Do you have any data -- and I know you've been  
11 asked this before, so maybe you've had a chance to think  
12 about it, but do you have any data that's available on the  
13 number of cases, for example, in Mohave County that have  
14 been reversed in post-conviction proceedings, say, in the  
15 last five years or any other time frame for ineffective  
16 assistance of counsel?

17 THE WITNESS: I don't have that data. But I  
18 think that the question is a little -- it's a little off  
19 base in that the post-conviction relief standard under  
20 *Strickland* is not necessarily the same as the ethical  
21 responsibility under the ethical rules to provide  
22 effective assistance of counsel.

23 So under *Strickland*, if you didn't do something  
24 but it doesn't make a difference it wasn't ineffective.  
25 Under the ethical rules, if you didn't perform your duties

1 and the things you're required to do you're unethical. So  
2 we are worried about both.

3 THE COURT: I'll overrule your objection to  
4 my question as phrased. But let me ask you the  
5 alternative then. Are you -- and this might be something  
6 that might be less available, but are you aware of  
7 historically attorneys in Mohave County that have been  
8 sanctioned by the bar for providing less than competent  
9 representation within any specific time frame?

10 THE WITNESS: I'm not aware in Mohave County.  
11 I'm aware of things that are going on around the nation.  
12 And I am not willing to subject myself or my attorneys or  
13 the County to that liability.

14 THE COURT: All right. Now, I know that the  
15 materials that were submitted talk -- cited a case over  
16 and over again in which there had been actual liability  
17 found for a public defender's office. And if I remember  
18 correctly, this was the public defender's office that was  
19 actually having all of their clients subjected to  
20 polygraphs and then were making a determination as to the  
21 people who passed the polygraphs and were more likely to  
22 be innocent, that there would be an allocation of funds  
23 for those people.

24 Doesn't that seem like a really extreme  
25 situation to you where the liability would just be

1 obvious?

2 THE WITNESS: While that's extreme, the  
3 holding of the court does not say it has to go that far.  
4 And, in fact, in a recent case -- I believe it's  
5 Powers versus Hamilton County or Hamilton versus Powers  
6 County -- the liability was based solely on the public  
7 defender's failure to challenge ability to pay in a  
8 restitution hearing.

9 And that happens routinely both in this county  
10 and throughout Arizona. It does not make it right. And  
11 the courts are saying it is not right.

12 THE COURT: Do you have any attorneys in your  
13 office that are death qualified? In other words, for the  
14 people who don't understand what that means, who are  
15 qualified to handle a capital case in which the death  
16 penalty is being sought?

17 THE WITNESS: No.

18 THE COURT: And therefore your office isn't  
19 currently representing anyone in death penalty cases, are  
20 they?

21 THE WITNESS: Ms. Lacy is second chair in a  
22 death penalty case.

23 THE COURT: And is she -- she meets the  
24 qualifications to do that?

25 THE WITNESS: To be second chair, yes.

1                   THE COURT: All right. One thing that I read  
2 in something that I just didn't understand and I wanted  
3 some clarification from you -- and this probably seems  
4 particularly irrelevant, but there was a -- one of the  
5 things -- one of the documents that you submitted  
6 referenced a statistic that I was curious about, a  
7 statistic that said 50 percent of the convictions and  
8 sentences in Mohave County were overturned and remanded  
9 for further proceedings in fiscal year 2006.

10                   Did I misunderstand that number?

11                   THE WITNESS: Of cases that were appealed,  
12 that's correct.

13                   THE COURT: Okay. So you're not saying then  
14 that 50 percent of every sentence that was imposed was  
15 reversed; you're saying that out of those people who  
16 appealed, that many were returned?

17                   THE WITNESS: That's correct.

18                   THE COURT: All right. I appreciate that  
19 clarification.

20                   Now, the standards that I've read, all of them  
21 talk about the fact that these are just a starting point,  
22 that local customs can suggest a deviation from the  
23 numbers. And I know that one of the things that I saw  
24 several times was, for example, if you're in a  
25 jurisdiction where the prosecutor has a no plea bargain

1 policy and a lot of cases go to trial, then you need to  
2 probably reduce the standards to take into account the  
3 fact that more cases are going to trial.

4 Is that an accurate statement?

5 THE WITNESS: That's roughly accurate, yes.

6 THE COURT: All right. Well, what about the  
7 converse? And I think you know where I'm coming from on  
8 this. If you're in a court where you never try cases,  
9 where you plead out all the cases, would that suggest that  
10 you should elevate the number and that it should be a  
11 higher number?

12 THE WITNESS: It would to me actually suggest  
13 that there's a serious question about the quality of  
14 representation. Because it's -- with a national average  
15 of five percent of cases going to trial, a particular  
16 attorney or court that did no trials would be suspect.

17 THE COURT: All right. Well, have you had  
18 attorneys in your office, for example, that have been  
19 assigned to my division that have never tried cases that  
20 you've had concerns about?

21 THE WITNESS: I have. They no longer work  
22 with the office.

23 THE COURT: All right. And you, in fact --  
24 you, in fact, do treat your FastTrack cases differently.  
25 If I understand this, because of the fact that these cases

1 are resolved through plea agreements, you, in fact, weight  
2 them differently and weight them as misdemeanors because  
3 of the fact that they don't go to trial. Correct?

4 THE WITNESS: No. We treat them as  
5 misdemeanors because the level of work required to resolve  
6 them is significantly less.

7 THE COURT: And, again, for those who may not  
8 understand, briefly what is the FaTrack system that your  
9 office utilizes?

10 THE WITNESS: The FaTrack system is a system  
11 where one attorney-essentially reviews all felonies in the  
12 justice courts, roughly 70 to 80 a week. That attorney's  
13 primary function is to ostensibly, with all due respect to  
14 the County Attorney's Office -- to get them to get us  
15 discovery, to look at the case, to make an offer, if  
16 there's going to be an offer, and to seriously consider  
17 whether felony charges should be pursued against this  
18 person or whether they should continue to remain in  
19 custody.

20 THE COURT: Do you -- and I -- it sounds like  
21 you keep a lot of statistics, so, do you have any figure  
22 that would represent the number of jury trials on felony  
23 cases that the Public Defender's Office handles per year?

24 THE WITNESS: I could review that. I don't  
25 have it at my fingers.

1                   THE COURT: All right. And I'll just put on  
2 the record that I know your office has not done a felony  
3 trial in my court for I think 46 jury trials.

4                   I'm also aware that your office maintains a  
5 fairly low profile in my court. It seems odd to me that I  
6 haven't had a felony jury trial with someone from your  
7 office within that period of time.

8                   Is there an obvious explanation for that that  
9 I'm overlooking?

10                  THE WITNESS: Well, as you mentioned, there  
11 were people that had previously been in here who didn't go  
12 to trial that are no longer with the office. But other  
13 than that we haven't staffed your courtroom in quite a  
14 while.

15                  THE COURT: Is it your understanding that  
16 people have left because -- because you felt that they  
17 were not trying enough cases or do you believe that  
18 there's people who left because they were not allowed to  
19 try cases that they wanted to?

20                  THE WITNESS: No one has ever been denied the  
21 right to try a case they wanted to try.

22                  THE COURT: Again, keeping in mind that the  
23 only perspective that I have is dealing with two people  
24 that have had the Public Defender's Office position  
25 before -- Ken Everett and you -- and this is probably



1 unfair, but Ken Everett, when he was here, had a regular  
2 caseload, appeared in my court every day, did sentencings,  
3 changes of pleas, and I looked back through my records, he  
4 did 32 jury trials during the time that he was the Public  
5 Defender.

6 And my question is not why can't you be more  
7 like Ken Everett but why -- why do you think that someone  
8 else would be able to maintain this type of caseload and  
9 also retain a staff and you can't?

10 THE WITNESS: Well, I guess the first thing  
11 I'd comment on is retain staff. In my review of the HR  
12 records that's a fallacy. That there was -- the average  
13 length of time for his attorneys was roughly 24 months.  
14 Our average length of retention for attorneys is 24  
15 months. So the turnover theory is -- is just a -- it's  
16 just not -- not true.

17 Secondly, in terms of why he was able to carry a  
18 caseload, I can only comment on the fact that the office,  
19 when I got there, had no database, had no management, no  
20 tracking of caseloads, no oversight other than as fast as  
21 cases came in attorneys took them, and I don't have  
22 sufficient details to comment on any of those.

23 THE COURT: Counsel, I don't have any other  
24 questions on my list here. If either of you have any  
25 follow-up questions that you wanted to ask I would

1 certainly allow you to do so.

2 MS. MEYERS: Thank you, Your Honor. Just a  
3 few clarifying questions.

4 REDIRECT EXAMINATION

5 BY MS. MEYERS:

6 Q. You talked at the outset of the Court's  
7 questioning about the staffing. How many attorneys did  
8 you request for the fiscal year, the current fiscal year?

9 A. Nine additional positions plus two interns,  
10 sufficient secretarial staff, investigators, and a  
11 paralegal.

12 Q. Did you get them?

13 A. We got one attorney.

14 Q. So you're short eight attorneys and other  
15 positions? I mean --

16 A. And, again --

17 Q. -- pursuant to your request.

18 A. Pursuant to the request, yes.

19 Q. And I think some of this data, the data that the  
20 Court -- was part of the Court's questioning and -- that  
21 reflects this request is in D -- Exhibit D-1. Do you have  
22 that in front of you?

23 A. Yes.

24 Q. What's that document?

25 A. It was a -- it was called Fiscal Year 2008

1 Professional Staffing Needs. It was a white paper that  
2 was submitted with our budget for fiscal year 2008.

3 Q. Did you prepare this?

4 A. Yes.

5 MS. MEYERS: Your Honor, we would move for  
6 the admission of D-1 into evidence.

7 THE COURT: It's ordered admitting into  
8 evidence D-1 for purposes of this hearing only.

9 (Exhibit D-1 was received into evidence.)

10 Q. (BY MS. MEYERS) And you were just questioned  
11 about the staff -- or the staffing and the size and the  
12 capacity of the office that you inherited in 2001. I  
13 think as I recall you mentioned that it had two attorneys  
14 in the office. Is that accurate?

15 A. Correct.

16 Q. And they were handling how many cases?

17 A. The number of cases that were handled by the  
18 office was 3300 cases. What I can't tell you is if that  
19 data is wholly accurate, if they had sent some of those  
20 out on contract or not. But the data that's in there that  
21 was recorded at the time -- and that was before I got  
22 here -- shows they handled 3300 cases.

23 Q. Are you aware of any standard that would permit  
24 an attorney to handle 1500 cases?

25 A. No. Absolutely not.

1           Q.       Do you -- there was some talk also about re-  
2   allocation from misdemeanor to felony. Are your  
3   misdemeanor, juvenile, appellate, felony attorneys all at  
4   their capacity under the standards as you understand them?

5           A.       Yes.

6           Q.       So if you shifted somebody somewhere else you're  
7   leaving a hole somewhere?

8           A.       It simply shifts the problem; it doesn't solve  
9   anything. It actually creates more problems than it  
10   solves.

11           MS. MEYERS: Your Honor, I have no further  
12   questions for Mr. Hlavac.

13           THE COURT: All right. Mr. Hlavac, you can  
14   step down. Thank you very much.

15           And you may call your next witness.

16           MS. MEYERS: We would call Professor Norm  
17   Lefstein.

18           THE COURT: All right, sir, you can step on  
19   up between the two tables. Come on up here, give your  
20   name to the clerk, spell it, and she'll swear you in.  
21   Right up here first, if you would.

22           PROFESSOR LEFSTEIN: Just wanted to put this  
23   down.

24

25

1 NORMAN LEFSTEIN,  
2 called as a witness, being first duly sworn, testified as  
3 follows:

4 THE COURT: All right, sir, you can have a  
5 seat right over here, if you would, please.

6 MS. MEYERS: Your Honor, I'm going to ask  
7 Professor Lefstein to introduce himself, but while I'm  
8 doing that may I have these exhibits marked?

9 THE COURT: Yes, you may.

10 DIRECT EXAMINATION

11 BY MS. MEYERS:

12 Q. Professor Lefstein, when you get settled would  
13 you introduce yourself to the Court and people in  
14 attendance?

15 A. Yes. My name is Norman Lefstein, Your Honor,  
16 and I am a Professor of Law and Dean Emeritus of the  
17 Indiana University School of Law at Indianapolis. And I  
18 teach in the areas of criminal law and professional  
19 responsibility, among others. And I also have done a good  
20 deal of work in the area of indigent defense, both as a  
21 practitioner and in studies and writings about public  
22 defense.

23 Q. And, Professor Lefstein, you're appearing as an  
24 expert in this matter?

25 A. Yes.

1           Q.     Are you being compensated in any way for your  
2 testimony?

3           A.     No, except for my expenses.

4           Q.     By the office of the Public Defender?

5           A.     I'm not absolutely certain -- no, it's not from  
6 the Public Defender's Office. I think there's an  
7 organization that is going to provide for my airfare,  
8 which turned out to be unusually modest.

9           Q.     And I want to thank you for coming from Indiana  
10 to be here this morning.

11                   Your Honor, may I approach?

12                   THE COURT: Yes.

13                   MS. MEYERS: Provide you with some copies  
14 of -- in the order that I think they're being marked.  
15 Thank you.

16                   Sorry, I didn't mean to give you the copies.

17                   May I approach, Your Honor?

18                   THE COURT: Yes.

19           Q.     (BY MS. MEYERS) I'm handing you what's been  
20 marked as Exhibits D-4, 5, and 6. Would you look at D-4,  
21 which I believe is your CV?

22           A.     Yes.

23           Q.     Is this your current CV?

24           A.     Yes, it is.

25           Q.     And just to quickly run through some of your

1 experience and the things that you've done that qualify  
2 you as an expert, could you describe your education?

3 A. Yes. I attended a small college in Illinois and  
4 received my law degree from the University of Illinois  
5 College of Law in Champaign and a master of law degree  
6 from the Georgetown University Law Center in a special  
7 program dealing with trial advocacy in the criminal courts  
8 back in the 1960s.

9 Q. And you're experienced as a practicing attorney?

10 A. Yes. Following law school I practiced in a  
11 civil practice for several years in Illinois, outside of  
12 Chicago. I then participated in the Georgetown program in  
13 the years 1963, 1964. And following that I served as an  
14 Assistant United States Attorney prosecuting criminal  
15 cases at trial and on appeal in Washington, D.C.

16 Subsequently I headed up a Ford Foundation  
17 project providing lawyers in juvenile courts in several  
18 cities in the United States -- Chicago, Newark and  
19 Cleveland -- engaged in a large social science research  
20 program about the impact of providing counsel to juveniles  
21 in juvenile court cases.

22 Subsequently I worked in the United States  
23 Department of Justice in a special office in the Deputy  
24 Attorney General's Office, working primarily on policy  
25 matters.

1           And thereafter I joined what was then the Legal  
2   Aid Agency in Washington, D.C., which became the public  
3   defender service for the nation's capital, first as the  
4   deputy director of the office and later as the director of  
5   the office. That was in the years 1969 to 1975.

6           Following that I served on the faculty of the  
7   University of North Carolina School of Law in Chapel Hill  
8   for 12 years, and became the dean of the law school at  
9   Indiana University School of Law in Indianapolis effective  
10  January 1, 1988. And I held the position of dean until  
11  2002, when I rejoined the faculty and also served as a  
12  special assistant to the chancellor of the university.

13           And I continue to serve on the faculty, although  
14  my teaching has been reduced while I have participated in  
15  other activities primarily related to indigent defense.

16       Q.     You hit on my next area. Could you describe  
17  some of the activities -- and you have a fairly lengthy  
18  CV, but some of the ones that relate particularly to the  
19  work that you did in this case?

20       A.     Well, over the years I've been involved in a  
21  number of different activities. First of all, on behalf  
22  of the American Bar Association I published a study  
23  dealing with indigent defense called Criminal Defense  
24  Services for the Poor in 1982. That was released by the  
25  ABA Standing Committee on Legal Aid and Indigent



1 Defendants.

2 I also was the reporter for the second edition  
3 of standards related to the defense function and providing  
4 defense services, and I chaired the task force that  
5 oversaw the development of the third edition of those  
6 standards, which are the current edition of those  
7 standards.

8 I also worked on the ABA Ten Principles of a  
9 Public Defense Delivery System which was adopted by the  
10 American Bar Association House of Delegates several years  
11 ago.

12 I also headed up for approximately seven to nine  
13 years a committee within the ABA that dealt with indigent  
14 defense services nationwide. And I held that position  
15 until the summer of 2007, just this past summer, when I  
16 ultimately resigned from that position.

17 I also have engaged in some writings in addition  
18 to those that I've already mentioned that pertain to  
19 indigent defense. And if you wish, I can talk about some  
20 of those publications.

21 Q. We are going to get into some of them. We can  
22 talk about them now. I think you referenced and you had  
23 prepared an affidavit that was provided to the County  
24 Attorney and the Court in connection with the prehearing  
25 memorandum. And you have described some of the work you

1 did in those -- on those publications. Let's talk briefly  
2 about that now. You --

3 A. I can do that. Let me -- I won't mention all of  
4 them but I'll mention just a couple. But I realize that I  
5 left out something of some relevance to this hearing. And  
6 that is that for 17 years, from 1990 until the summer of  
7 2007, I chaired the Public Defender Commission for the  
8 State of Indiana by appointment of Indiana's governors.  
9 And as chair of that commission I was very much involved  
10 in developing standards pertaining to caseload that are  
11 applicable in the state of Indiana.

12 Some of the publications, in addition to those  
13 I've already mentioned, was, importantly, standards for  
14 providing defense services that contain provisions  
15 relating to workload.

16 In addition to those I engaged in a study of  
17 indigent defense in the United States as well as in  
18 England. And I published a lengthy article comparing and  
19 contrasting public defense in the United States with  
20 practices in England and Wales that appeared in print in  
21 2004.

22 There are some others, including an article that  
23 I published in December, 2006, dealing with a recent  
24 ethics opinion of the American Bar Association. That  
25 ethics opinion deals with caseloads by defenders handling

1 criminal and juvenile cases. That article was published  
2 in The Champion magazine, published by the National  
3 Association of Criminal Defense Lawyers.

4 I also was the principal author of a report that  
5 was released in 2004 by the American Bar Association's  
6 Standing Committee on Legal Aid and Indigent Defendants.  
7 That report was entitled Gideon's Broken Promise:  
8 America's Continuing Quest For Equal Justice.

9 MS. MEYERS: Your Honor, we would move for  
10 the admission of Professor Lefstein's CV into evidence for  
11 the purpose of this hearing.

12 THE COURT: That's D-4?

13 MS. MEYERS: Yes.

14 THE COURT: It's ordered admitting into  
15 evidence Exhibit D-4 for purposes of this hearing only.

16 (Exhibit D-4 was received into evidence.)

17 Q. (BY MS. MEYERS) Professor, what were you asked  
18 to do in this case?

19 A. I was asked to review a good number of materials  
20 pertaining to the public defender program in Mohave County  
21 and to make a judgment concerning the caseloads of the  
22 office, whether they were deemed to be appropriate or  
23 might present issues of an ethical or other nature.

24 Q. And what have you reviewed in order to reach the  
25 conclusions you've reached in this case?

1           A.       Well, I reviewed some of the documents which  
2       Mr. Hlavac referred to in his testimony. One of those is  
3       the FY 2008 professional staffing needs document that  
4       Mr. Hlavac prepared.

5                   I also reviewed detailed data prepared several  
6       weeks ago about the individual caseloads of the defenders  
7       in his office. I reviewed certain motions and orders that  
8       were entered in this case and overall sought to  
9       familiarize myself with the situation in this county  
10      related to public defense and caseloads.

11          Q.       Have you reviewed the affidavit of John Wesley  
12      Hall in reaching your opinions?

13          A.       Yes. I also reviewed just yesterday for the  
14      first time an affidavit of John Wesley Hall who I  
15      understood from his affidavit has reviewed the same  
16      materials that I have seen.

17          Q.       Talk a little bit the ethical obligations of  
18      defense attorneys as outlined in the professional rules of  
19      conduct and some of the other documents you may have  
20      referenced already, certainly the Arizona rules of  
21      professional conduct.

22          A.       Well, to begin with, a lawyer providing public  
23      defense, much like any other lawyer licensed in the state  
24      of Arizona, has a duty to provide competent  
25      representation. The very first rule adopted in Arizona

1 and in virtually every other state of which I'm aware says  
2 that a lawyer shall provide competent legal representation  
3 to the client, which requires the legal knowledge, skill,  
4 thoroughness, and preparation reasonably necessary for the  
5 representation.

6 In addition to that, a lawyer must be diligent  
7 in providing representation, provided for in rule 1.3 of  
8 the Arizona rules of professional conduct. And that  
9 requires promptness in representing the client.

10 As related to public defense, that obviously  
11 means that you don't undertake the representation of a  
12 client and permit the client to sit in a jail,  
13 incarcerated for a long period of time without providing  
14 immediate contact with the client and doing all that is  
15 necessary to represent the client.

16 Indeed the commentary to rule 1.3 in Arizona  
17 says -- when it talks about diligence, it adds in the  
18 comment: "A lawyer's workload must be controlled so that  
19 each matter can be handled competently."

20 And, obviously, whether it's assignments for  
21 repairing toilets or doing any other kind of work that one  
22 might undertake, if you have too much of the work to do,  
23 in public defense, if you have too many clients, you  
24 obviously cannot bring to bear the sort of competence that  
25 the rules of professional conduct require.

1           And the failure to do so subjects an attorney to  
2   the potential for discipline under the sanctions that are  
3   made available or are available against lawyers in this  
4   state and in other states.

5           Q.       What are the duties?  Communication --

6           A.       Well, there's obviously a duty of communication.  
7   Perhaps the most principal one that I did not mention  
8   contained in rule 1.4 of the rules of professional  
9   conduct, you need to communicate fully and frequently with  
10  one's client.  And that requires the ability to explain to  
11  the client all that is really necessary to be understood  
12  so that clients can make an informed judgment about what  
13  ought to happen in their case.

14           Moreover, there is a requirement to avoid  
15  conflicts of interest.  And conflicts of interest are  
16  really relevant when one talks about excessive workloads.  
17  Because if you have too many cases, you have to pick and  
18  choose who you are going to adequately represent, and of  
19  necessity there are going to be some that you cannot  
20  adequately represent.

21           And rule 1.7 makes it clear that you need to  
22  avoid a situation where the representation of one client  
23  will be materially impacted by virtue of duties to another  
24  client.  And that's the way in which rule 1.7 is  
25  implicated with excessive caseloads.

1           Q.     Are you familiar with Arizona Rule of  
2 Professional Conduct 5.1?

3           A.     Yes. 5.1 is a rule of professional conduct that  
4 directly implicates Mr. Hlavac, because it provides that a  
5 supervisor of other attorneys is himself or herself guilty  
6 of professional misconduct if he or she permits the  
7 lawyers under their supervision to undertake more  
8 representation than they can competently handle.

9                     And, therefore, if a supervisor simply allows a  
10 situation to continue without taking action may himself or  
11 herself be subject to discipline by virtue of the  
12 situation in which those under his or her supervision are  
13 operating.

14          Q.     Are you familiar with Arizona Rule of  
15 Professional Conduct 1.16?

16          A.     1.16 --

17          Q.     Which is titled Declining or Terminating  
18 Representation?

19          A.     Oh, yes. 1-16.

20          Q.     Sorry.

21          A.     I always call it 1.16. Yes. There is clearly a  
22 duty to decline representation or to seek to withdraw from  
23 representation if your continued representation would  
24 cause you to violate a rule of professional conduct.

25                     And in this instance you would be violating the

1 duty of competent representation if you continue to  
2 provide the representation when you don't have the  
3 capability of doing so.

4 Q. Off the top of your head -- and I know you don't  
5 have the rules in front of you -- can you think of other  
6 ethical obligations of defense attorneys that are  
7 implicated in the scenario we have here, which is  
8 excessive caseloads by the attorneys in the office of the  
9 Public Defender?

10 A. Well, I'm sure that there probably are others,  
11 but off the top of my head I would tell you that I think  
12 we've talked about most of them, certainly ones that are  
13 most significant to this hearing.

14 Q. Let's talk a bit about the performance standards  
15 for defense attorneys. And you've had a significant  
16 amount of experience as an actual defense attorney.  
17 You've also had experience as a prosecutor. Talk about  
18 the range of responsibilities a defense attorney has to  
19 his client, the court, its office.

20 A. Well, I could give a long answer, but let me  
21 give a relatively modest one and begin by noting that  
22 probably the most detailed performance standards for the  
23 defense function were developed by the National Legal Aid  
24 and Defender Association a few years ago.

25 And that booklet of the National Legal Aid and



1 Defender Association runs some 150 pages, setting forth in  
2 excruciating detail the broad range and possibilities and  
3 considerations that a defense lawyer has in undertaking  
4 the representation of a client.

5 But to simplify it, obviously the defense lawyer  
6 needs to gather all of the requisite facts relevant to  
7 advising the client. That means engaging in discovery  
8 from police and prosecution. It may require interviewing  
9 witnesses, visiting crime scenes, being aware of any  
10 physical evidence relevant to the case, understanding  
11 whether or not the client may have some mental  
12 difficulties, have some concern in an appropriate case  
13 about expert witnesses.

14 And, obviously, it all begins with talking with  
15 the client and interviewing the client at length. If the  
16 client is incarcerated, investigating whether or not  
17 there's an appropriate motion for the client's release,  
18 determining in the pretrial stage what motions might be  
19 appropriate, perhaps visiting the crime scene, exploring  
20 whether there is an appropriate plea that should be  
21 entered.

22 But the lawyer needs to prepare himself or  
23 herself with an understanding of the case even before  
24 engaging in plea negotiations.

25 And, of course, if a case should go to trial or

1 if there is a guilty plea, preparing for the sentencing  
2 and gathering information that might not otherwise be  
3 called to the attention of the court unless the defense  
4 lawyer gathers the requisite social information.

5 So those are some of the considerations, it  
6 seems to me, important in the defense function.

7 Q. You mentioned that you had reviewed the  
8 affidavit of John Wesley Hall. And in his affidavit he  
9 talks at some length about some of these areas of  
10 preparation. He talks specifically on page 6 of his  
11 affidavit at paragraph 17 about pleas and the work  
12 involved in a plea. Have you read -- do you recall that  
13 portion of his affidavit?

14 A. I do.

15 Q. And do you concur in his analysis of the duties  
16 involved in negotiating --

17 A. Absolutely. I mean, one of the problems in  
18 public defense sometimes in the United States has been  
19 that public defenders -- and I'm not talking here about  
20 Mohave County, but public defenders in the United States  
21 sometimes are known as lawyers who meet and plead their  
22 clients. That is not in conformity with the duty of  
23 providing competent representation.

24 Obviously, there are going to be a good number  
25 of cases in the criminal justice system where it is

1 appropriate for the client to enter a plea of guilty. But  
2 that is not something that ought to be done until the case  
3 is thoroughly understood and investigated by the defense  
4 and the defense is really competent to advise the client  
5 that the guilty plea should be entered.

6 And I think that's the point that -- if I  
7 recall, that Mr. Hall was making in the paragraph to which  
8 you refer in his affidavit.

9 So that's a consideration, it seems to me, in  
10 the performance of defense lawyers that needs to be  
11 understood.

12 Q. And we have referred today during the testimony  
13 of Mr. Hlavac to various caseload numerical standards and  
14 workload standards. I want to talk a little bit about  
15 those.

16 In your view, what is the difference between a  
17 caseload and workload?

18 A. Well, I think caseload is often used to refer to  
19 one of two things. It's used to refer to the number of  
20 cases that a lawyer handles over a period of time,  
21 typically a 12-month period; it can also refer to the  
22 number of cases that a lawyer has at a specific time.

23 During Mr. Hlavac's testimony he was really  
24 referring to caseload in those two different contexts, as  
25 I heard his testimony.

1           Workload really refers to the total amount of  
2 work that a lawyer has to do either at a specific time or  
3 possibly over a period of time. But it really needs -- it  
4 needs to be understood as to the total pressures that are  
5 brought to bear upon the lawyer and might include some  
6 nonrepresentational duties that lawyers typically have in  
7 a defender office.

8           Q.     And referring to the numerical caseload  
9 standards, you talk about them in your affidavit. Could  
10 you briefly describe what those are, what they stem from?

11          A.     Well, the first standards of any kind developed  
12 in the United States related to caseloads really emanate  
13 from a publication entitled The Courts which was published  
14 by the National Advisory Commission on criminal justice  
15 standards and goals, which was appointed by the president  
16 of the United States.

17                 And this softbound book published in 1973  
18 contained standards or recommendations for the numbers of  
19 cases that a public defender could handle or perhaps  
20 should handle over the course of a 12-month period,  
21 including the very ones that are being discussed here and  
22 that were referred to in the *Smith* case decided by the  
23 Arizona Supreme Court.

24                 Specifically they were 150 felonies, 400  
25 misdemeanors, 200 juvenile cases, and 25 appeals. I think

1 those were the principal ones mentioned. They may have  
2 been the only ones, but I think there was perhaps another  
3 one in there as well.

4 I know something about how those standards were  
5 developed. And, frankly, they were not based, even in  
6 1973, on very solid evidence of any kind. They have,  
7 however, been repeated and used as a benchmark by various  
8 national organizations over a period of time.

9 The National Legal Aid and Defender Association  
10 has embraced them as maximum kinds of numbers that should  
11 never be exceeded.

12 In August of 2007, just this past August, the  
13 American Council of Chief Defenders, which is a subgroup  
14 within the National Legal Aid and Defender Association, in  
15 effect re-embraced those numbers as maximum numbers that a  
16 defender should use over a 12-month period. But they did  
17 so in a memorandum that accompanied the resolution they  
18 adopted.

19 And if you read the memorandum closely it makes  
20 for a very compelling case that the numbers are too high.  
21 And one of the things that the memorandum does is explain  
22 how a criminal defense practice is more complex and more  
23 difficult in many ways than it was even in 1973 when the  
24 numbers were first adopted.

25 More difficult because of the complexity of

1 sentencing schemes enacted by state courts -- by state  
2 legislatures; more difficult as a result of scientific  
3 evidence that lawyers oftentimes need to become familiar  
4 with; more complex by virtue of the collateral  
5 consequences of guilty pleas. All matter of collateral  
6 consequences attach today in ways that were not the case  
7 back in 1963.

8           And to fully advise the defendant under rule  
9 1.4, to communicate fully with the client lawyers ought to  
10 understand those collateral consequences.

11           The American Bar Association has never  
12 technically embraced those numbers, partly out of concern  
13 that the numbers might be inaccurate or numbers that ought  
14 not necessarily to be followed.

15           The ABA is often said to have embraced those  
16 numbers. And the reason is that there are two  
17 publications of the ABA that reference the numbers.

18           In providing defense services for which I was a  
19 reporter back in the 1970s and shared the task force  
20 subsequently, the commentary refers to the numbers and  
21 suggests they've proven resilient over time, which I think  
22 means they've been used a lot, but the actual standard  
23 simply said lawyers need to control their workload, in so  
24 many words.

25           And you need to control the workload so as not

1 to take so many cases that you won't be able to provide  
2 quality representation or you won't be able to fulfill  
3 your professional obligations under the rules of  
4 professional conduct. That was the basic standard.

5 The ABA Ten Principles of a Public Defense  
6 Delivery System, principle 5 similarly said workload has  
7 to be controlled in order to provide quality  
8 representation.

9 There is some comment after principle 5 which  
10 says that in no event should national standards be  
11 exceeded. And it's clear the comment was referring to  
12 those standards back from 1973.

13 However, technically when the American Bar  
14 Association House of Delegates approved the ten principles  
15 and when they approved providing defense services, they  
16 only really approved the black letter. The commentary is  
17 technically not something that the American Bar  
18 Association formally embraced.

19 And that's why I make this distinction between  
20 the ABA not necessarily having embraced these numbers and  
21 others have.

22 The one thing I want to add to all of that is  
23 that my own personal view is, based on my experience years  
24 ago in Washington, D.C., based upon my experience informed  
25 by what many defender programs do around the country -- is

1 that I think those numbers are frequently too high. And  
2 that it is very difficult to do everything you want to do  
3 in representing a client and live within those National  
4 Advisory Commission standards, though as I state in my  
5 affidavit prepared for this case and admitted now I think  
6 they can be useful as providing at least some form of a  
7 benchmark.

8 But I think all would concede that you have to  
9 not only look at the numbers but you have to actually make  
10 an assessment of the workload. Because you can have no  
11 more -- let's say, for example, 150 cases over a 12-month  
12 period and be terribly overloaded because they're very  
13 serious cases. And you simply cannot handle them  
14 competently by virtue of their seriousness, complexity,  
15 number of witnesses involved, and yet you might  
16 technically be within the 150 number.

17 And that's why I emphasize you really need to  
18 analyze the workload of the attorney and make a  
19 determination about what needs to be done in the cases  
20 and, conversely, what may not be getting done in the cases  
21 because the lawyer has too many.

22 Q. You referred to making this assessment. Who  
23 makes that assessment?

24 A. Individual lawyers must make the assessment and  
25 supervisors of those lawyers need to make that assessment.



1 And it needs to be done obviously on an individual basis.

2 And I might add that there's an ethics opinion  
3 of the Arizona State Bar Association -- I believe it's  
4 90-10 -- decided in 1990, and what that opinion said was  
5 essentially what the ABA standards say, is, that if you've  
6 got too many cases you need to withdraw or seek to avoid  
7 the assignment of additional cases.

8 But in addition to that, that opinion by the  
9 Arizona State Bar Association made it very clear that in  
10 the opinion of the committee that wrote the opinion you  
11 can't reduce this to a numerical formula.

12 And they also added -- and I think it's  
13 particularly significant for this case -- that great  
14 weight -- that was the term they used -- great weight  
15 needs to be attached to the judgment of the attorneys who  
16 are deciding whether or not their caseload is excessive.

17 Q. You -- I think you mentioned State v. Smith  
18 which is the Arizona Supreme Court opinion that relates to  
19 caseloads. Are -- you're familiar with that case?

20 A. I am.

21 Q. And what -- what does that case mean?

22 A. Well, that case, I think, basically looked at  
23 those recommended numbers. And it's a case that, as  
24 everyone knows by now, originated out of Mohave County.  
25 And the Arizona Supreme Court said those numbers ought not

1 to be exceeded but they're maximum allowable numbers. But  
2 judgments regarding the workload still have to be made.  
3 Those numbers are in some sense a starting point but  
4 they're not the end, and you need to look beyond simply  
5 the numbers themselves.

6 Q. So to paraphrase all that, determining whether  
7 or not an attorney is meeting his or her ethical  
8 obligations is not simply a matter of referring to a  
9 numerical formula; it's more nuanced?

10 A. It absolutely is not that. Lawyers in private  
11 practice don't behave that way. And it's one of the  
12 problems in public defense, that somehow there is this  
13 belief that all cases are fungible, all attorneys are the  
14 same.

15 Workload is what you have to look at. And  
16 that's informed by the complexity of the cases, the  
17 experience of the attorneys, and everything that needs to  
18 be done in connection with those cases. No two attorneys  
19 are created identically, no two cases are created  
20 identically, and that's why judgment comes into the  
21 picture.

22 Q. And I'm not sure if you referred to this, but  
23 the ABA's formal opinion on caseloads --

24 A. I didn't.

25 Q. Could you talk about that a little bit, please?

1           A.       Well, the American Bar Association Standing  
2 Committee on Ethics and Professional Responsibility issued  
3 an opinion dated May, 2006 in which they dealt with this  
4 issue of excessive defender caseloads.

5                   And I think it's fair to say that it's the most  
6 influential ethics body in the United States because of  
7 the way in which they carefully prepare and craft their  
8 opinions.

9                   And what they said is, frankly, no different  
10 than what I've been talking about. They basically said  
11 that lawyers need to make judgments about their workload,  
12 that numerical case standards are useful perhaps as a  
13 reference but you need to look beyond the numbers  
14 themselves, and that you will either have to withdraw  
15 or -- and/or seek to avoid the appointment of new cases  
16 when your workload is excessive.

17                  And in a circumstance where the cases are being  
18 assigned by the court, then you have to go to the court,  
19 provided for under the rules of professional conduct, rule  
20 1.16 that we referenced before, and make the motion to  
21 withdraw, because it has to be addressed to the court.

22                  But that was the essence of the ABA opinion.  
23 And in a sense it is nothing more in many ways than a  
24 repetition of what was already in the ABA standards,  
25 standard 5-5.3 on workload, which I discussed earlier, and

1 it's not fundamentally different than the Arizona State  
2 Bar ethics opinion 90-10 that I referred to earlier,  
3 making it very clear what the obligation is both of the  
4 individual lawyer and the obligation of the supervisor.

5 And the ABA ethics opinion dealt with both: the  
6 individual lawyer and the duty of the supervisor.

7 Q. You referred to the ABA's opinion-making with  
8 respect to ethics as influential because of the way in  
9 which they carefully formulate those. Are you aware that  
10 the Arizona rules of professional conduct largely stem  
11 from the ABA model rules on which that opinion was --

12 A. Yes, I am. And they do substantially track the  
13 ABA Model Rules of Professional Conduct.

14 And to make it clear, the ABA ethics opinion,  
15 while based upon the ABA Model Rules of Professional  
16 Conduct, are exactly the same rules that I was referencing  
17 earlier respecting the State of Arizona.

18 Occasionally states will make some differences,  
19 but in regard to rules 1.1, 1.3, 1.4, 5.1, and 1.7, which  
20 are rules I cited earlier, every single one of those rules  
21 under the ABA Rules of Professional Conduct, almost all of  
22 which are referenced in that ethics opinion, are identical  
23 to the Arizona rules.

24 Q. What conclusions did you draw based on these --  
25 the performance standards, the ethical obligations, the

1 various caseload and workload standards that you've just  
2 testified to -- what conclusions did you draw with respect  
3 to this office and its attorneys?

4 A. I think the lawyers in this office and the  
5 office as a whole are way overloaded. Mr. Hlavac referred  
6 to caseloads of particular attorneys this morning, those  
7 caseloads that they have at a particular time, and those  
8 caseloads -- some of them for some of the attorneys strike  
9 me as just way too high, just based upon my experience of  
10 what lawyers can do in fully representing their clients.

11 I mean, one of the attorneys that was referenced  
12 this morning had a felony caseload of 64 cases, I believe  
13 it was. And I will tell you that really carefully  
14 controlled workloads of attorneys in public defender  
15 programs in the United States are not nearly that high.

16 The office that I directed in Washington, D.C.  
17 some years ago -- and even today -- does -- that office  
18 simply does not allow attorneys to have felony caseloads  
19 that high. And, of course, they're able to avoid it  
20 because they have the finances and a sufficient staff to  
21 avoid that sort of a problem.

22 And similarly at the misdemeanor level there  
23 were caseloads provided that were well over 100 current  
24 caseloads that lawyers have. Those are excessive  
25 caseloads, I think, by any measure. But if you look at

1 the office as a whole and you take the National Advisory  
2 Commission standards, standards that I cited earlier in my  
3 comments, the office is far exceeding those standards  
4 today.

5 I looked at those standards vis-a-vis the  
6 workload in -- the caseload in that office for 2006. And  
7 on a weighted system that they're using, they came out in  
8 2006, given their current staffing -- given the staffing  
9 at that time, at 267 cases as opposed to 150 and -- which  
10 would have been the norm under the National Advisory  
11 Commission standards.

12 And part of what they're doing in a way is  
13 something that really isn't called for by the National  
14 Advisory Commission standards, because one of the things  
15 that they're doing, I supposed to benefit the County and  
16 to make it as manageable as possible, is that they're  
17 taking these so-called FastTrack cases, which are actually  
18 felony cases but because they get disposed of earlier  
19 they're discounting them as if they're not felony cases.

20 And in order to get to the point where maybe  
21 they are disposed of in the first 20 days or so, one would  
22 assume that there's a great deal of intensive work that  
23 would have to happen even to get to that point.

24 But my point is broader than that. Because if  
25 you look at the National Advisory Commission standard of

1 150 felony cases, they never said: "Well, you ought to  
2 discount that standard if you've got a FastTrack system in  
3 the jurisdiction." They simply said "150 felony cases,"  
4 understanding that some of those felony cases are going to  
5 be disposed of fairly quickly.

6 But then some are not. Some are going to last a  
7 long time and some are going to go to trial, and some may  
8 wind up going up on appeal.

9 But if you don't use this discounted system,  
10 which, as I said, in 2006 yielded 267 weighted caseloads  
11 versus what it should be at 167 -- if you don't use that,  
12 in 2006 it was 310.

13 So I think you can make the argument that this  
14 is an office that has been tolerating very, very  
15 substantial caseloads for a long period of time,  
16 particularly because the data I've seen indicates the  
17 number of cases going into the system has been going up,  
18 the number of lawyers on the staff has been going down,  
19 and now finally the crunch really hits where there is not  
20 even the capacity to put off some of these cases to  
21 private lawyers by virtue of contact, which is really what  
22 brings this hearing about today.

23 So in answer to your question, I think there has  
24 been a problem but I think the problem has become truly  
25 over the top as of the current situation in December of

1 2007.

2 Q. You reviewed data from years prior to 2006. Is  
3 that --

4 A. I did.

5 Q. And your conclusions with respect to caseloads  
6 in those years based on the data you reviewed was -- I  
7 think it's starting at page 11 of your affidavit, if you'd  
8 like to refer to it.

9 A. Well, I know I went through it year by year, and  
10 I analyzed what was the weighted caseload, using the  
11 discount for FasTrack cases that are in the office. And  
12 for a number of different years that are cited in my  
13 affidavit I was coming out each year with a weighted  
14 caseload that was above the 150 number.

15 Q. So historically they've been in excess of this  
16 150 number?

17 A. Yes. Going back, I think the -- what was the  
18 paragraph?

19 Q. Paragraph 23, page 11.

20 A. Let me refresh my recollection with that.

21 Yeah. In fiscal year 2003, the weighted  
22 caseload was 275; in 2005 it was 255; and then the numbers  
23 in 2006 are the ones I mentioned.

24 So, you know, you can go back and choose any  
25 year you want, beginning, I guess, with 2003. 2004 is the



1 year I didn't mention; it was 275. So each of those years  
2 the office has been way above by their own system where  
3 they had data through the system they put into place where  
4 they've just been way in excess of those numbers which I  
5 contend are probably too high to begin with in the vast  
6 majority of defender programs.

7 Q. So it's fair to say that if you were to evaluate  
8 it in this nuanced way that is contemplated by the ABA  
9 opinion and other rules of professional conduct, it's --  
10 it's in excess under either of those measures?

11 A. That's right. But I think in addition to all of  
12 that what is really important is the contact Mr. Hlavac  
13 has had with his attorneys, where he's sat down and talked  
14 with them.

15 Because ultimately that's what has to happen.  
16 And it obviously has happened in this situation.

17 Q. And your conclusion, just so that the record is  
18 clear, is with respect to each attorney in the office for  
19 whom you received data, which I think was the nine active  
20 attorneys at the time of your affidavit?

21 A. Well, my opinion was that there were excessive  
22 caseloads, that they were violating rules of professional  
23 conduct, threatening not to provide the competent  
24 representation required, and that the system ultimately is  
25 flawed in the way in which it is undertaking to provide

1 representation.

2 I recognize it's a funding problem, but there's  
3 a constitutional right at stake here as well as an ethical  
4 duty of the lawyers who are licensed by the State of  
5 Arizona.

6 Q. In your opinion, what -- what has to happen in  
7 light of this conclusion?

8 A. Well, I think they need to be permitted not --  
9 they need to be permitted to withdraw from the cases in  
10 which they have sought to withdraw and as necessary to  
11 stem the tide of additional assignments. Because this  
12 problem will obviously -- if they withdraw from these  
13 cases and new cases over the next 60 days come into the  
14 pipeline and they're asked to take them, nothing has been  
15 resolved.

16 Beyond that, obviously, because this is a  
17 county-based system, the County needs to figure out a way  
18 to respond to what is effectively a crisis in the  
19 administration of criminal and juvenile justice.

20 Q. You touched a little bit on my next question.  
21 What happens if they are not permitted to withdraw or  
22 decline new assignments?

23 A. If they are not permitted?

24 Q. Yes.

25 A. Well, I would assume one of the things they

1 would probably do is seek some sort of appellate action.  
2 And indeed the ethics opinion of the ABA suggested, I  
3 think quite unequivocally, that where a defender is in the  
4 situation that this office is in and they don't get relief  
5 at the trial court level, they need to consider taking an  
6 appeal of the situation.

7           Beyond that, the only choices the lawyers are  
8 left with is a doubles choice, because under the rules  
9 they really have a duty to proceed as best they can to  
10 represent the client or to refuse to proceed and be held  
11 in contempt.

12       Q.     You were in the courtroom when the Court asked  
13 Mr. Hlavac some questions. And I want to refer  
14 specifically to the questions regarding training. What --  
15 is training essential in the --

16       A.     Training is absolutely essential. For lawyers  
17 who come out of law school -- and I've obviously been in  
18 legal education now for more than 30 years -- no lawyers  
19 graduate from law school able, from that day afterwards,  
20 to step in and adequately and effectively provide criminal  
21 defense representation.

22           I think lawyers who graduate from our schools  
23 today are well educated and they're well trained, but  
24 they're not sufficiently trained to undertake the  
25 necessary representation in criminal and juvenile cases

1 without training.

2 We train policemen, we train firemen, we train  
3 all kinds of persons in our society who undertake  
4 specialized responsibilities. And this is a specialized  
5 responsibility. And simply following someone around while  
6 they are doing it is not sufficient.

7 I referenced in my affidavit a training program  
8 that we developed more than 30 years ago in the D.C.  
9 public defender service where we never let any lawyers go  
10 into court until they had read and briefed a number of  
11 cases and had participated in the agency's own in-house  
12 training program which dealt with mock motions of various  
13 kinds of issues that we dealt with. Because we simply  
14 were not comfortable letting them defend somebody's  
15 liberty and make judgments on behalf of these people until  
16 they had had some very important initial training.

17 And then we tried to offer very close  
18 supervision, which we thought was essential, and I think  
19 is still very essential for new graduates.

20 Q. The Court posed a scenario to Mr. Hlavac about  
21 re-allocating attorneys from other divisions,  
22 misdemeanor to -- you know, at least make some contact  
23 with clients sitting in custody. Could you --

24 A. Well, I thought Mr. Hlavac handled the question  
25 well and gave an appropriate response, that if you take

1 those lawyers out to handle the felony cases they will not  
2 be lawyers who are necessarily trained and prepared to  
3 handle those cases. Moreover, they will leave other  
4 clients in the lurch, so to speak, because they're already  
5 representing other clients.

6 The only thing that Mr. Hlavac didn't say that I  
7 want to add to his answer is that the ethics opinion that  
8 the American Bar Association issued in May of 2006 made  
9 very clear what I think the rules of professional conduct  
10 make clear, and that is that your first obligation is to  
11 your current clients.

12 And, therefore, it would be a breach of  
13 responsibility to leave those current clients in order to  
14 try to somehow plug the dike and deal with these cases  
15 that somehow now don't have lawyers.

16 I mean, I think there's a problem obviously when  
17 they don't have lawyers and they're not receiving prompt  
18 representation as contemplated by the rules of  
19 professional conduct, but Mr. Hlavac has already a current  
20 obligation to the current clients. And that's what would  
21 be violated.

22 So in effect I think he probably would be  
23 violating responsibilities not only to the current clients  
24 by leaving them but he probably couldn't adequately  
25 represent the new clients because he's already got too

1 many total cases to begin with.

2 MS. MEYERS: Your Honor, if there are any  
3 additional questions that you would like us to ask or that  
4 you would like to ask Professor Lefstein yourself, I'm  
5 finished with --

6 THE COURT: I have no questions. I read all  
7 of his material. And I think you've done a thorough job  
8 of covering the high points and the relevant points of his  
9 affidavit.

10 So, Professor Lefstein, you can step down.  
11 Thank you very much.

12 THE WITNESS: Thank you, Your Honor.

13 MS. MEYERS: And, Your Honor, at this time --

14 THE COURT: I'm sorry, did you have something  
15 more that --

16 MS. MEYERS: No, no. We would like to offer  
17 into evidence for the limited purpose of this hearing the  
18 affidavit of Professor Lefstein, which is, I believe, D-5,  
19 and the affidavit of John Wesley Hall, which is D-6.

20 THE COURT: All right. It is ordered  
21 admitting into evidence for purposes of this hearing only  
22 Exhibits D-5 and D-6. Of course, the affidavit of  
23 Professor Lefstein I'd already read.

24 (Exhibits D-5 and D-6 were  
25 received into evidence.)

1           THE COURT: And, Ms. Meyers, do you have  
2 anything further to present at this time?

3           MS. MEYERS: No, Your Honor.

4           THE COURT: And argument.

5           MR. HARRISON: First of all, Your Honor, I  
6 want to thank you for affording us this much time. It's  
7 been very gratifying. And you've been very patient and  
8 asked a lot of thoughtful questions. It's obvious you're  
9 taking this matter very seriously. And we appreciate  
10 that.

11           You've heard testimony now from Mr. Hlavac and  
12 Professor Lefstein, and you have the affidavit of John  
13 Wesley Hall. And I think it's pretty self-evident that  
14 all of them are extremely well qualified to testify about  
15 the issues presented by the motions to withdraw.

16           Professor Lefstein and John Wesley Hall in  
17 particular are nationally known experts who have dealt  
18 extensively with this very issue. And so we're fortunate  
19 to have their opinions help inform the Court in making a  
20 decision.

21           I noted at the outset of the hearing that when  
22 all is said and done -- and this became crystal clear in  
23 Professor Lefstein's testimony -- when all is said and  
24 done, the judgment about whether a lawyer, as a  
25 conscientious member of the bar and as an officer of the

1 court, is in compliance with the rules of professional  
2 conduct is ultimately that lawyer's decision.

3 In the case of a public defender agency that  
4 decision is necessarily made in consultation with the  
5 supervisor of the agency.

6 I don't propose to read a lot to you because I  
7 know you've read everything, but I simply want in the  
8 record a paragraph from Arizona ethics opinion 90-10.

9 "Ethical rule 1.16 makes clear that a lawyer  
10 with a maximum caseload must decline new cases  
11 or terminate representation where the  
12 representation will result in violation of the  
13 rules of professional conduct or other law.  
14 "Consequently, where the demands of an extreme  
15 caseload make an attorney unable to devote  
16 sufficient attention to a particular case,  
17 acceptance of that case will cause a violation  
18 of ethical rules 1.1 on competent representation,  
19 1.3 on attorney diligence, and 1.16 for failing  
20 to decline or terminate representation where the  
21 representation will violate those rules.

22 "Thus, a lawyer who accepts more cases than he  
23 can competently prosecute will be committing an  
24 ethical violation."

25 And that, of course, is precisely why we're



1 here. Because Mr. Hlavac and his attorneys had come to  
2 the regrettable conclusion that once the contract funds  
3 were no longer available they were in an overload  
4 situation and in immediate jeopardy of committing ethical  
5 violations.

6 And I might say -- and I -- without making any  
7 ad hominem references -- I've been teaching legal ethics  
8 at both of the Arizona law schools for more than a decade.  
9 And I concur in everything that Professor Lefstein said  
10 about the rules that are implicated by a competent  
11 criminal defense.

12 The only one he didn't mention that I would  
13 mention is 1.2 which obligates the lawyer to have a very  
14 clear understanding about the scope of his or her  
15 representation when undertaking criminal defense.

16 The other thing which wasn't specifically  
17 mentioned but which I know the Court is keenly aware of is  
18 that there is an obvious correlation between compliance  
19 with all of these ethical rules and the affected clients'  
20 rights under both the federal and state constitutions.  
21 And that's why this matter is a matter of such significant  
22 consequence.

23 I think the total of the testimony makes very  
24 clear that you cannot assign a finite number of public  
25 defenders to the indigent defense function. There will

1 always be fluctuations based on attrition in the staff,  
2 difficulties in the caseload that make it simply  
3 impossible to comply with ethical obligations if you have  
4 a finite number of public defenders.

5 And that's precisely why the system up to now  
6 has functioned adequately, because there was an escape  
7 valve. I'm not going to make any plumbing references,  
8 Your Honor, but the fact of the matter is that the  
9 contract system provided an overflow mechanism that  
10 basically mitigated this problem.

11 I will make one other reference on this point,  
12 and that is that when Mr. Hammond and I argued the *Zarabia*  
13 case, which, as I acknowledged, does not present precisely  
14 the same issues, the court in the case made it very clear  
15 that public bodies like the county, like Mohave County,  
16 can't basically resolve their financial responsibility to  
17 fund a proper public defender system by putting it on the  
18 backs of attorneys and causing them to basically violate  
19 their ethical responsibilities.

20 So what we would like you to do, what we ask you  
21 to do is, first of all, grant all of the pending motions  
22 to withdraw, so that these lawyers will not be forced to  
23 seek appellate review and/or be forced into a situation  
24 where their clients are being denied the rights under the  
25 Constitution.

1           And, in addition, because we know that there  
2 will be -- this is not a problem that's going to be solved  
3 until there is additional funding of some kind from the  
4 board of supervisors, there will be additional motions to  
5 withdraw that aren't currently pending before you, we  
6 think it would be entirely appropriate and essential for  
7 you to order all Mohave County Public Defenders  
8 individually and in consult with their supervisors to file  
9 motions to withdraw whenever, in their individual  
10 judgment, in consultation with their supervisors, the  
11 acceptance of a new case would cause them to violate their  
12 obligations as officers of the court and as members of the  
13 bar pursuant to the rules of professional conduct.

14           And so that's the relief we would like Your  
15 Honor to enter.

16           We think the record presented to you today  
17 clearly indicates that that is the appropriate and  
18 required thing to do.

19           And if you have any questions of me, since I'm  
20 the only one who hasn't been placed under oath, I'll be  
21 happy to answer any questions you have.

22           THE COURT: I have no questions.

23           And, Mr. Hammond, I don't believe there's  
24 anything that you could possibly add to what has been  
25 presented.

1           Are you thinking that you have some standing or  
2   some need to add something further?

3           MR. HAMMOND:   No.

4           THE COURT:   Okay.  And, Mr. Terribile, with  
5   due respect I don't believe you have standing, but I'm  
6   very happy that you have been here.

7           I also need to say, I am hoping that we have  
8   accomplished something at this hearing.  There are a  
9   number of people from the County that have been here.  I  
10   think that this is going to be an educational experience.  
11   I have a feeling that perhaps ways that budgeting issues  
12   might be presented during budgeting sessions may not have  
13   covered some of this ground.  And I hope that this has  
14   been an education to everyone.

15          As I've indicated before, I'm going to enter an  
16   order in writing.  I think that this is serious enough  
17   that I want to reduce something to writing.  There are --  
18   and I have a pretty good idea of what I'm going to do.  I  
19   think there are ramifications to my decision, some  
20   logistical issues that I need to figure out how to address  
21   in an order, at least maybe on a temporary basis.

22          I anticipate being able to have an order that is  
23   disseminated hopefully by Monday.  I don't believe that  
24   something being done by tomorrow is realistic.  But I will  
25   enter an order as soon as possible.

1                   And I appreciate the input from everyone.

2                   Even you, Mr. Zack, just sitting there was very  
3 helpful to me.

4                   So do I have anything further either from  
5 Mr. Harrison or Ms. Meyers?

6                   MR. HARRISON: No, Your Honor. We're  
7 finished.

8                   THE COURT: All right. We'll stand at  
9 recess.

10                  Off the record.

11                  (The proceedings concluded at  
12 11:57 a.m., December 13, 2007.)

13

14

15

16

17

18

19

20

21

22

23

24

25

## Certificate of Reporter

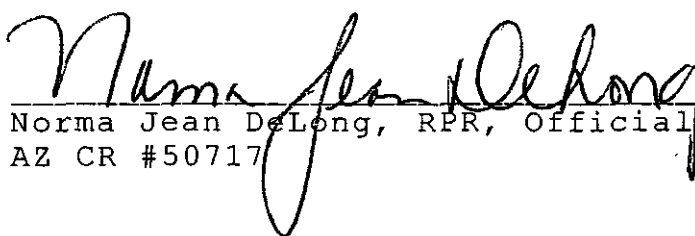
I, Norma Jean DeLong, Official Reporter in the Superior Court of the State of Arizona, in and for the County of Mohave, do hereby certify that I made a shorthand record of the proceedings had at the foregoing entitled cause at the time and place hereinbefore stated;

That said record is full, true and accurate;

That the same was thereafter transcribed under my direction; and

That the foregoing typewritten pages constitute a full, true and accurate transcript of said record, all to the best of my knowledge and ability.

Dated this 14th day of January, 2008.

  
Norma Jean DeLong, RPR, Official Reporter  
AZ CR #50717